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RAILROAD CASES.

A COLLECTION OF ALL
CASES AFFECTING RAILROADS OF EVERY KIND DE-
CIDED BY THE COURTS OF APPELLATE
JURISDICTION

IN THE
UNITED STATES, ENGLAND AND CANADA.

EDITED BY
THOMAS J. MICHIE.

VOLUME VI.
NEW SERIES.

NORTHPORT, LONG ISLAND, N. Y.
GEO. R. B. MICHIE & CO., PUBLISHERS.
BUSINESS OFFICE AND MANUFACTURING DEPARTMENT AT
CHARLOTTESVILLE, VA.



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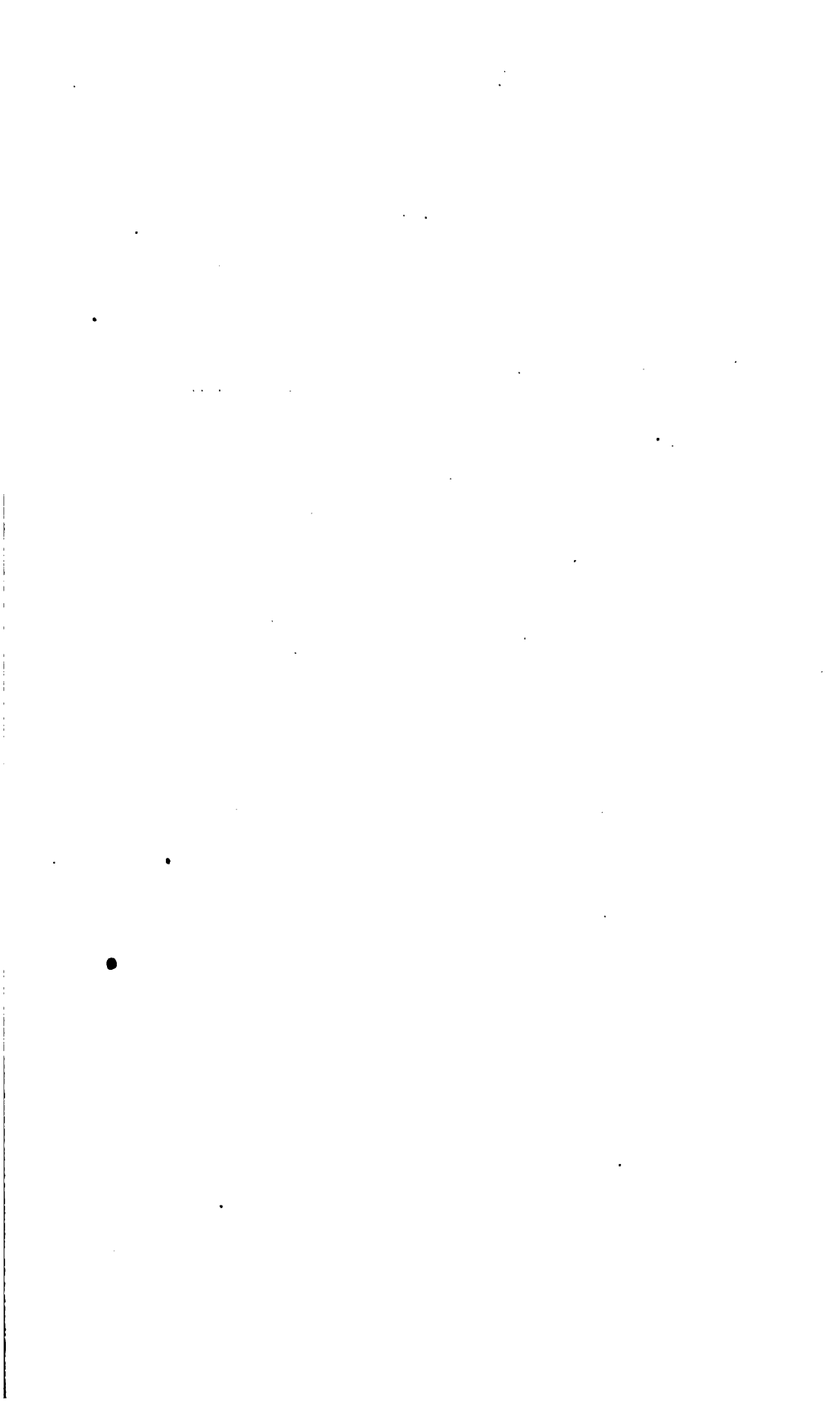
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THE
AMERICAN AND ENGLISH
RAILROAD CASES

NEW SERIES.

VOL. VI.

UNION PAC. RY. CO. *et al.**

v.

CHICAGO, R. I. & P. RY. CO.

UNION PAC. RY. CO.*

v.

CHICAGO, M. & ST. P. RY. CO.

(163 U. S. 564.)

Powers of Railroad Corporations.—Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the state, disable themselves from the discharge of the functions, duties, and obligations which they have assumed.

Contracts of Railroad Corporations—Ultra Vires.—The general rule is that a contract by which a railroad corporation renders itself incapable of performing its duties to the public, or attempts to absolve itself from those obligations without the consent of the state, or a contract made by a corporation beyond the scope of its powers,

Note.—For a very comprehensive treatment of *ultra vires* in this connection, see 27 Am. & Eng. Ency. of Law 357; see also 3 Am. & Eng. R. R. Cas. 564; 20 Am. & Eng. R. R. Cas. 537; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396; 25 Am. & Eng. Corp. Cas. 369.

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express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel. But where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.

Power of Railroad Corporation to Allow Joint Use of its Tracks.—A contract between the P. Railway Company and the R. Railway Company, in which it is provided that the P. Company lets the R. Company into the full, equal, and joint possession and use of its main and passing tracks, the possession being such as the R. Company would have while its trains were on the tracks, and only of the particular part occupied temporarily while running over them, the trains of the R. Company to be moved, while on such track, under the direction and control of officers of the P. Company. *Held*, that such contract is not *ultra vires*.

Grant of Use of Bridge to Other Roads—Power of Railroad Corporation.—By an act of congress the P. Company was authorized, for the more perfect connection of any railroads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska, to build a bridge over such river, and to issue bonds for such purpose, and to secure them by mortgage on the bridge, approaches and appurtenances. The act further provided that the P. Company, for the use and protection of its bridge and property, should be empowered, governed, and limited by the provisions of a preceding act authorizing the construction of certain bridges, in which the owners of such bridges were required to allow all railroads terminating at or near the bridges to cross the bridges for a reasonable compensation. *Held*, that the P. Company was authorized to make a contract granting the use of the bridge and approaches thereto to other railroads.

Avoidance of Contract—Future Contingency.—Such contract between the P. Company and the R. Company, whereby the R. Company is granted the use of the tracks and bridge of the P. Company, and which the P. Company is able at present to perform, will not be held void, and the P. Company allowed to escape from the obligations it assumed, on the mere suggestion that at some time in the remote future there is a possibility that the P. Company might become disabled by reason of increase of business to perform it.

Contracts of Corporations—Validity.—Where no objection has been made by a state to the acts of a railroad corporation in constructing its line of railway in the state, and acquiring the use of the tracks of another company, a contract made by such corporation, not beyond the scope of its powers, must, in the absence of proof to the contrary, be deemed valid.

Contracts of Corporations—Expiration of Corporate Existence.—Where, in a contract between two railroad corporations, express provision is made that in case of the expiration of the corporate existences of the parties to it such steps shall be taken as are necessary to continue the contract in force, and the parties thereto bind themselves to do so, the fact that the corporate existence of one of the parties will expire during the prescribed term of duration is not cause for holding such contract invalid.

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Power of Railroad Corporation Over Subordinate Corporation.—A railroad company created, controlled, managed, and operated by, and entirely subject to, another railroad corporation will be bound by a contract act of such corporation leasing the road of the controlled corporation.

Jurisdiction of Supreme Court.—While the decision of the supreme court necessarily reviews the decree of the circuit court in reviewing the action of the circuit court of appeals, and, under the statute, its mandate goes to the circuit court directly, it is, notwithstanding, the judgment of the circuit court of appeals that is presumably revised, and judgments of the circuit court of appeals should not be re-examined on the suggestion of error in that court, in that it did not hold the action of the circuit court erroneous.

Contracts between Railroad Corporations.—There being nothing in the charter of a railway company, unless by implication, that prohibits it from granting to another railway company the use of its bridge and the approaches thereto, and of a portion of its tracks, and as by such arrangement public interest was subserved, such arrangement will not be held invalid.

Ratification of Corporate Contract by Board of Directors.—Where a contract of a corporation appears on its face to have been duly executed, and the parties have entered upon its execution, necessarily with the full knowledge on the part of the board of directors, the board would be presumed to have ratified it, although it in fact took no affirmative action in the matter.

Same.—The contracts in question were in proper form signed and executed by the proper executive officers of the P. Company, and attested by the corporate seal; were approved and authorized by the executive committee, which committee had all the powers of the board of directors, and were ratified, approved and confirmed by the stockholders at their regular annual meeting. *Held*, that such contracts are binding on the P. Company, although the board of directors took no formal action upon them.

Government Directors.—The fact that there are directors representing the government in the board of directors of a railway corporation does not take the corporation out of the general rule that, except in cases where the charter imposes a limitation, the stockholders are the proper parties to take final action in the management of the corporate affairs.

Specific Performance—Equity.—Where such contract for the right to use a bridge, the approaches thereto and accommodations has been made between two railroads, its specific performance will not be refused in equity on the ground that it requires continuous acts involving skill, judgment, and technical knowledge.

Provision for Referees.—The provision in such contract for referees in certain contingencies is a mere matter of detail, and not of the essence of the contract.

Case at Bar.—It appears that the contract in question was solicited by the P. Company, was fairly made, on terms substantially proposed by itself, and that its violation by that company was unjustifiable. The contract was approved promptly and with unanimity. The consideration appears to have been fair and reasonable. The R. Company abandoned its purpose of building its own bridge in reliance on such contract. It entered upon the performance of the contract, and large sums of money were expended in carrying it out. *Held*, that specific performance of such contract on the part of the P. Company was properly decreed.

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APPEAL from the circuit court of appeals for the Eighth Circuit.

These were petitions in equity filed by the Chicago, Rock Island & Pacific Railway Company against the Union Pacific Railway Company and the Omaha & Republican Valley Railway Company, and by the Chicago, Milwaukee & St. Paul Railway Company against the Union Pacific Railway Company, in the district court of Douglas county, Neb., January 2, 1891, to compel the specific performance of two contracts, dated May 1, 1890, and April 30, 1890, respectively, and removed on petition of the Union Pacific Railway Company to the United States circuit court for the district of Nebraska, where they were heard by MR. JUSTICE BREWER, and decrees rendered in favor of complainants. 47 Fed. 15. From these decrees defendants appealed to the United States circuit court of appeals for the Eighth circuit, by which they were affirmed. 10 U. S. App. 98, 2 C. C. A. 174, 51 Fed. 309. Thereupon these appeals were prosecuted.

To the contract of May 1, 1890, the Union Pacific Railway Company, the Omaha & Republican Valley Railway Company, and the Salina & Southwestern Railway Company were parties on one side and the Chicago, Rock Island & Pacific Railway Company and the Chicago, Kansas & Nebraska Railway Company on the other; and the contract of April 30th was between the Union Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company.

The Union Pacific Railway Company controlled and operated more than 5,000 miles of railroad, and, among others, a main line extending from Council Bluffs, Iowa, by way of Omaha and Valley Station, Neb., to Ogden in Utah territory, a distance of about 1,100 miles; a main line from Kansas City, Mo., by way of Topeka and Salina, Kan., to Denver, Colo.; the Republican Valley Railroad, extending from Valley Station, Neb., by way of Lincoln and Beatrice, in that state, to Manhattan, Kan.; the Salina Railroad, extending from Salina to McPherson, in Kansas; a railroad

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extending from Hutchinson, in Kansas, to the southern border of that state; and other auxiliary roads.

The Rock Island Company owned and operated a line of railway extending from Chicago, by way of Davenport, to Council Bluffs, Iowa, and from Davenport to St. Joseph, Mo. As the owner of the latter line, and lessee of the Chicago, Kansas & Nebraska Railway Company and other corporations, it controlled and operated a through line of railway from Chicago, by way of Davenport, St. Joseph, and Beatrice, Neb., to Colorado Springs and Denver, Colo.; a line from St. Joseph, Mo., by way of Horton, Topeka, and Hutchinson, to Liberal, Kan.; and other lines,—amounting in the aggregate to more than 3,000 miles of railway.

The Union Pacific Railway owned nearly all of the stock and bonds, elected the directors, and built, controlled, and operated the railroads of the Republican Valley and Salina Companies, and the Rock Island Company owned and operated the roads of the Kansas Company under a lease for 999 years, so that the Pacific Company and the Rock Island Company were practically the real parties in interest to the contract of May 1st.

The St. Paul Company was operating more than 6,000 miles of railroad, and one of its lines extended from Chicago to Council Bluffs, Iowa.

Early in 1890 the Rock Island Company determined to connect its lines from Chicago to Council Bluffs with its southerly line to Colorado Springs by constructing a bridge across the Missouri river at Council Bluffs, and a railroad from that terminus, by way of Omaha and South Omaha and Lincoln, to Beatrice, Neb., thereby shortening its line from Chicago to Denver and Colorado Springs; and the St. Paul Company joined in the undertaking in order to extend its line from Council Bluffs on to Omaha and South Omaha. Acting in concert, the two companies caused a corporation to be created under the laws of the state of Iowa by the name and style of the Nebraska Central Railway Company, with power to build a bridge across the river at Omaha,

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and one or more lines from that city west. Congress granted to this corporation the necessary franchise for the bridge. (23 Stat. 43.) Preliminary surveys and estimates were made, which showed that the entire cost of the bridge and tracks to South Omaha would be about \$2,500,000. In February, 1890, the presidents of the St. Paul and Rock Island Companies visited New York for the purpose of arranging for the construction of the proposed work, when the Pacific Company requested them to suspend operations, and proposed to make a trackage arrangement with them by which they could use the bridge and tracks of the Pacific Company between Council Bluffs and South Omaha for their terminal facilities in Omaha and South Omaha, and the continuous line desired by the Rock Island Company could be completed. By direction of the president and at least two directors of the Pacific Company, its chief of construction and two of its directors obtained a meeting with the presidents of the St. Paul and Rock Island Companies and agreed with them upon the terms of the contracts in question. From the memoranda then made by the chief of construction of the Pacific Company, the contracts were subsequently drawn. They were examined and approved by the general solicitor of the company at Omaha. The executive committee of the board of directors of the Pacific Company at a meeting on April 22, 1890, at which six of the seven members of that committee were present, five in person and one by proxy, considered and unanimously voted to approve of the contracts and authorized the president to execute them. The custom of the secretary had been not to specify in the notice of the meetings of the executive committee the subjects to be considered, and the notice of this meeting did not state that the subject-matter of these contracts would be considered. The member of the executive committee who was absent and not represented was a government director.

At the annual meeting of the stockholders of the company, held April 30, 1890, at which more than two-thirds of the stock was represented, these contracts and

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the action of the executive committee thereon were considered, and resolutions passed, by a unanimous vote of that stock, approving and ratifying the contracts and the action of the committee authorizing their execution. The call of the annual meeting did not state that the subject-matter of these contracts would be considered, but that certain other subjects would be, and that the meeting was for the selection of directors for the coming year and the transaction of any other business which might legally come before the meeting. The record of the meeting of the executive committee, April 22, 1890, reads thus:

“The president submitted Vice President Holcomb’s letter No. 1,139, dated April 18, 1890, inclosing an agreement between this company and the Chicago, Milwaukee and St. Paul Railway Company, and an agreement between this company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Kansas & Nebraska Railway Company, dated May 1, 1890.

“Whereupon, after consideration, it was,

“On motion of Mr. Spaulding,

“Voted unanimously, that the agreement submitted to the committee between this company and the Chicago, Milwaukee & St. Paul Railway Company, granting trackage rights to the latter company over this company’s lines between Council Bluffs, Omaha, and South Omaha, for a period of 999 years from May 1, 1890, at a monthly rental of \$3,750, is approved, subject to the ratification of the stockholders, and the president is hereby authorized to execute the same on behalf of this company;

“Voted, unanimously that the agreement submitted to the committee dated May 1, 1890, between this company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Kansas & Nebraska Railway Company, providing for the use of this company’s lines

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from Council Bluffs to Omaha, including the bridge over the Missouri river and the lines of this company's Omaha & Republican Valley Branch from Lincoln to Beatrice, Nebraska, and for the use by this company of the Chicago, Kansas & Nebraska Railway Company's lines between McPherson, Kansas, and South Hutchinson, Kansas, for a period of 999 years from May 1, 1890, and for the use of the line between the cities of South Omaha and Lincoln, Nebraska, for a period of 999 years from October 1, 1890, at the rentals severally provided for therein, is approved, subject to the ratification of the stockholders, and the president is hereby authorized to execute the same on behalf of the company."

The following are the resolutions severally adopted by a separate vote of the entire stock represented in favor of each:

"Resolved, that the agreement between the company and the Chicago, Milwaukee & St. Paul Railway Company, dated May 1, 1890, granting trackage rights to the latter company over this company's lines, between Council Bluffs, Iowa, and Omaha and South Omaha, Nebraska, a copy of which is herewith submitted, be, and is hereby, approved, and the action of the executive committee in authorizing its execution is hereby ratified, approved, and confirmed.

"Resolved, that the agreement between the Union Pacific Railway Company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Kansas & Nebraska Railway Company, dated May 1, 1890, a copy of which is herewith submitted, granting to the latter companies trackage rights over this company's lines from Council Bluffs to Omaha, including the Omaha bridge, and the lines of this company's Omaha & Republican Valley Branch from Lincoln to Beatrice, Nebraska, and providing, further, for the use by this company of the Chicago, Kansas & Nebraska Railway Company's line between McPherson and South Hutchinson,

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Kansas, and the line from South Omaha to Lincoln, Nebraska, on the terms therein provided for, be, and is hereby, approved, and the action of the executive committee in authorizing the execution thereof is hereby ratified, approved, and confirmed."

At this time the whole number of shares was 608,685, and 437,376 shares were voted.

It is not disputed that the board of directors and the body of the stockholders of the other corporations, parties to the contracts, took proper action to authorize and ratify the execution thereof by their respective corporations, and that the formal execution of the contracts by the parties to them was sufficient.

The preamble to the Rock Island contract described the several railways owned by the parties, and recited: That the Rock Island Company had become a domestic corporation of the state of Nebraska, and proposed to extend its railway from its terminus at Council Bluffs to a connection with its leased line, the Chicago, Kansas & Nebraska Railway, at the city of Beatrice. That the parties to the contract believed that the interests of all would be promoted by using, for a part of said extension, the main tracks of the Union Pacific Railway Company, in the cities of Council Bluffs and Omaha, the bridge over the Missouri river, and that portion of the Omaha & Republican Valley Company, owned by the Union Pacific Company, between Lincoln and the point of junction at the city of Beatrice; by a lease from the Rock Island Company to the Union Pacific Company of a portion of the railroad controlled by it, between McPherson and Hutchinson, Kan., a distance of about 30 miles; and a lease of the right of the Union Pacific Company to operate its trains over the road which the Rock Island Company was about to build between the cities of South Omaha and Lincoln.

The contract provided: "The Pacific Company hereby lets the Rock Island Company into the full, equal, and joint possession and use of its main and passing tracks, now located and established, or which may be hereafter located and established, between the

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terminus of such tracks in the city of Council Bluffs, in the state of Iowa, and a line drawn at a right angle across said tracks within one and one-half ($1\frac{1}{2}$) miles southerly from the present passenger station of South Omaha, in the state of Nebraska, including the bridge on which said tracks extend across the Missouri river, between said cities of Council Bluffs and Omaha; connections with Union Depot tracks in Omaha, the side or spur track leading from its main tracks to the lower grade of the Pacific Company's sidings and spur tracks in Omaha, and such extensions thereof as may be hereafter made; side tracks in Omaha, on which to receive from and deliver to the Rock Island Company freight that may be handled through the warehouses, or switched by the Pacific Company; the connections with the Union Stock Yards tracks in South Omaha, and conveniently located grounds in South Omaha, on which the Rock Island Company may construct, maintain and exclusively use a track or tracks, aggregating three thousand (3,000) feet in length, for the storage of cars and other purposes, for the term of nine hundred and ninety-nine (999) years, commencing on the 1st day of May, in the current year—for which possession and use the Rock Island Company covenants, promises, and agrees to pay to the order of the said Pacific Company, monthly, during the continuance of said term, the sum of three thousand seven hundred and fifty (3,750) dollars," and a certain portion of the expense incurred in maintaining and operating the property between Council Bluffs and South Omaha, and of the assessments and taxes levied thereon, in proportion as its wheelage should be to the entire wheelage over the same, and also a reasonable compensation for handling its traffic in Omaha. That the Pacific Company lets the Rock Island Company into the full, joint, and equal possession and use of its tracks, stations, and appurtenances along the line of the railway of the Republican Valley Company, from a point near the northern boundary of the city of Lincoln to the point where its tracks connect with those of the Kansas Company at

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Beatrice, Neb., for the same length of time, for which the Rock Island Company agrees to pay the Pacific Company a certain rental, computed on a percentage of the value of the main track, and a proportion of the cost of maintenance. That the Rock Island Company lets the Pacific Company into the full, joint, and equal possession and use of its tracks and stations along the lines of the Kansas Company from McPherson to Hutchinson for the same length of time, for a rental to be computed in the same way. That the Rock Island Company lets, leases, and demises to the Pacific Company, for a like term, commencing October 1, 1890, the right to move and operate over the tracks of the railway it proposes to construct between the cities of South Omaha and Lincoln, in the state of Nebraska, its freight and passenger trains, engines, and cars of all classes for a rental based upon a mileage of the trains. That each of the parties to the contract shall take such steps as will be necessary to continue all the stipulations of the contract in force. That each contract of lease shall attach to that portion of the railway leased during the corporate existence of the owner thereof, and all extensions of such existences, by renewal or otherwise, and that the contract shall bind the parties thereto, their successors, grantees, and assigns. That "schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly-authorized officers of the lessor and lessee companies by which such railways shall at the time be operated. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege, and advantage to trains of the same class operated by the lessor and lessee, and to trains of a superior class operated by either a preference over trains of an inferior class operated by the other. All rules and regulations shall be reasonable and just to both lessor and lessee, and shall secure to neither any preference or discrimination against the other. They shall be executed and all trains moved under the immediate direction of the

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superintendent or other officer of the lessor company. If the parties cannot agree upon the adoption of any schedule, rule, or regulation, or as to the modification of any one existing, either party may demand a decision of such controversy by referees as hereinafter provided. The referees are hereby invested with power to prescribe schedules, rules, and regulations, and to modify existing ones, and, in case of willful disregard by either party of the rights of the other, to award damages to the party injured for injuries sustained because of such willful act." That the referees shall be appointed, when needed, by the selection of one by each party, and the appointment of a third by the two so chosen, with further provision for their action in cases of disagreement in other particulars.

It was also agreed that the Pacific Company might admit any other company to the joint use and possession of the same tracks and property upon substantially the same terms, provided such additional burden did not interfere with the Rock Island Company. Another provision was as follows: "If, for any reason, any of the covenants, promises, and agreements in any of these articles expressed, and not material to the right of the lessee to use the property leased and demised, shall be adjudged void, such adjudication shall not affect the validity or obligation of any other covenant, promise, or agreement which is in itself valid. In the event of a failure in law of any of the covenants, promises, and agreements herein contained, such steps shall be taken and contracts made as shall be advised by counsel to carry into effect the purpose and intent herein expressed."

The Rock Island Company was chartered to exist until 1930, but the charter provided that its existence might "be renewed from time to time as may be provided by the laws of the states of Illinois and Iowa."

The Rock Island Company, upon the construction of its proposed line from South Omaha to Lincoln, obtained, by the agreement, access to Omaha and South Omaha, and a shorter continuous line from Chicago to

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Denver by way of Council Bluffs, Lincoln, and Beatrice, than by its southerly route; while, by the use of the proposed road from South Omaha to Lincoln, the Pacific Company obtained a line from Omaha to Lincoln and Beatrice about 40 miles shorter than its former route by way of Valley Station, and by its use of the road from McPherson to Hutchinson, it filled the gap between its line there, and obtained a continuous line, by way of Salina, to the southern boundary of Kansas, and a rental of \$45,000 a year, and other compensation as provided.

The contract with the St. Paul Company let it into the joint and equal use of the tracks and bridge between Council Bluffs and South Omaha for the same time and on the same terms named in the contract with the Rock Island Company. The main tracks of the Pacific Company, to be used under this contract, were two, extending a distance of about seven miles, from Council Bluffs, across the bridge, and through the city of Omaha, to South Omaha.

On the 17th of May the superintendent of the Pacific Company addressed a letter to the superintendent of the Rock Island Company, requesting the construction of the connecting track which would enable it to use the Kansas Railway between McPherson and Hutchinson. The Rock Island immediately constructed the track, and the Pacific Company at once began to use it and continued to use it until January 12, 1891.

The Rock Island proceeded with the construction of its road from South Omaha to a connection with the tracks of the Republican Valley in Lincoln, and secured depots and yards in Omaha, and South Omaha, and made an arrangement with the Pacific Company for the construction of freight and passenger stations and a yard on the ground of the Republican Valley road in Lincoln, to be used by the Rock Island and Pacific Companies jointly. Prior to December 1, 1890, it had expended in such construction between South Omaha and Lincoln over \$1,400,000. All this was done in reliance upon the contract, and the railway and buildings erected could be

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used for the principal purpose for which they had been constructed only in connection with the tracks of the Union Pacific at and between Council Bluffs and South Omaha and at and between Lincoln and Beatrice. The work at Lincoln had commenced on December 1st, when the Pacific Company notified the Burlington & Missouri Company, whose depot it had theretofore been using, that after December 31st it would abandon such use. This notice was given with the intention of entering into the joint use of the Rock Island depots and tracks.

About June 1, 1890, the St. Paul Company entered upon the use and possession of the bridge and the tracks between the points named in its contract.

November 26, 1890, a change of management in the Union Pacific took place, and opposition to the contracts developed. Early in January, 1891, the Pacific Company forcibly prevented the use by the Rock Island and St. Paul Companies of its tracks at Omaha, which they were entitled to use under the contracts, and absolutely refused to perform the contracts. Thereupon these suits were commenced, one by the Rock Island Company against the Pacific Company and the Republican Valley Company, and the other by the St. Paul Company against the Pacific Company. The Pacific Company set up, by way of defense, that the use of this road as claimed would deprive it of the means granted to it under the act of congress to earn moneys with which to maintain its corporate existence, perform the duties of a common carrier, and meet the demands of the government; that the officers of the Pacific Company were not so authorized to execute the contracts as to make it competent for them to do so, and that they were not so entered into as to bind the company to the performance thereof; that the contracts were unjust and inequitable, and were improvidently made, and ought not to be sanctioned and enforced by a court of equity; that the government directors of the Pacific Company did not authorize or sanction the contracts; that the contracts were *ultra vires*, and that that company did not

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have any right, power, or authority to enter into them ; and that the contracts were not such as a court of equity could or should specifically enforce.

In the Rock Island Case, the circuit court decreed that the contract was "the valid obligation of the parties thereto, and should be performed in good faith by each of them," and that it secured the several rights embraced thereby, all of which were specifically set forth, subject to the following limitations :

"(1) That the engines, cars, and trains of complainant shall be moved on said tracks under rules and regulations to be agreed upon by and between the parties, or ordained by referees selected and appointed in the manner provided by said contract, and securing equality of right, privilege, and advantage to trains of the same class operated by both parties, and to trains of a superior class operated by either a preference over trains of an inferior class operated by the other, which rules and regulations shall be executed, and all engines, cars, and trains moved, under the immediate direction of the superintendent or other officers of the defendant, the Union Pacific Railway Company.

"(2) That the Union Pacific Railway Company may admit any other company or companies operating a connecting railway or railways to the joint possession and use of the railway, or any part thereof, at and between Council Bluffs and South Omaha, upon substantially the same terms as those granted to the complainant, and apply the compensation which it may receive from such additional company or companies to its own use, without accounting for the same or any part thereof to the complainant.

"(3) The complainant shall not do any business as a common carrier of persons or property to or from any stations on said line between said cities of Lincoln and Beatrice.

"(4) That complainant shall make compensation for such possession and use as provided by said contract."

The decree then continued :

"III. That the defendants, the Union Pacific Rail-

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way Company and the Omaha & Republican Valley Railway Company, are commanded severally to specifically perform, keep, and observe the several covenants, promises, and agreements in said contract set out to be by them, either jointly or severally, observed, kept, or performed; and that said railway companies, and the officers, agents, attorneys, and employees of each, are hereby commanded and enjoined to wholly refrain from directly or indirectly interposing any obstacle, interference, hindrance, or delay to the performance of the several promises, covenants, and agreements in said contract set out, or to the enjoyment of any of the rights or privileges by said contract granted, concerning the railway and railway property above described, by any and all of the parties to said contract, or by any of the officers, agents, attorneys, or employees of said parties, or any of them; and especially from in any manner obstructing or interfering with said complainant in restoring and maintaining the connections which have heretofore been constructed, or in constructing and maintaining, at such point or points as may be determined under the contract, additional necessary connections between the railways of the Chicago, Kansas & Nebraska Railway Company and the Omaha & Republican Valley Railway Company at Beatrice, and between the railway of complainant and that of the Omaha & Republican Valley Railway Company at Lincoln, in the state of Nebraska, and between the railway of complainant and the railway of said Union Pacific Railway Company, at South Omaha and Omaha, in the state of Nebraska, and the city of Council Bluffs, in the state of Iowa; and from doing any act or thing, or permitting the doing of any act or thing, if it shall have power to prevent the same, whereby said complainant may be prevented from enjoying any and all of the benefits and advantages secured to it by said contract, or doing any act or thing which the complainant by the terms of said contract is authorized to do, from interfering with the use of, and from removing, injuring or destroying, buildings or other structures erected by the

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complainant upon the grounds of the defendant, the Omaha & Republican Valley Railway Company, in the city of Lincoln, in the state of Nebraska, without the consent of said complainant.

“IV. That each and every party hereto is commanded to refrain from interposing any obstacle or hindrance to the establishment, or alteration, or amendment in the manner provided by said contract, of time cards, rules, and regulations governing the operations of engines, cars, and trains over said railways and every part thereof, or to the execution and enforcement of such time cards, rules, and regulations, when so established, altered, or amended, otherwise than by apt proceedings in a court having competent jurisdiction.

“V. That nothing in this decree contained shall operate to estop any party hereto from recovering against another party or parties, by appropriate proceedings in law or equity, the compensation to which it is now, or may be hereafter, entitled, for the use of any of the railway and appurtenant property between and at Council Bluffs and South Omaha, between and at South Omaha and Lincoln, between and at Lincoln and Beatrice, and between McPherson and South Hutchinson, or from recovering in such proceedings damages which it has sustained, or may sustain, because of any breach or violation of said contract.

“VI. That while this decree is final in determining the rights of the parties under said contract, the court reserves the power to make additional orders from time to time, as may be necessary to enforce such rights.”

The decree in favor of the St. Paul Company was to the same effect, *mutatis mutandis*.

John F. Dillon and John M. Thurston, for appellants.
J. M. Woolworth, for Chicago, R. I. & P. Ry. Co.
Geo. R. Peck, for Chicago, M. & St. P. Ry. Co.

MR. CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the court :

The questions to be considered are whether these

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contracts were within the corporate powers of the parties, were duly authorized as respects the Union Pacific Railway Company, were such contracts as a court of equity can specifically enforce, and were properly enforced on the merits.

It will be most convenient to consider the appeal in the case of the Rock Island Company. If the decree in favor of that company is affirmed, a like result must follow on the appeal in the case of the St. Paul Company. And we may remark, in the outset, that the main contention of the Pacific Company concerns the tracks between Council Bluffs and South Omaha, including the bridge.

1. Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the state, disable themselves from the discharge of the functions, duties, and obligations which they have assumed. Can it be held that the contract with the Rock Island Company, judged by its terms, construed in the light of matters of common knowledge, of the evidence, and of applicable legislation, was made in the assumption of powers not granted, or amounted to the surrender of powers that were?

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public, or attempts to absolve itself from those obligations without the consent of the state, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel. *Thomas v. Railroad Co.*, 101 U. S. 71; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478.

But where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing "whatever may fairly be

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regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*." Navigation Co. v. Hooper, 160 U. S. 514, 525, 16 Sup. Ct. 379; Attorney General v. Railway Co., 5 App. Cas. 473, 478; Brown v. Winisimmet Co., 11 Allen, 326, 334.

Taking up the contract with the Rock Island Company, what is the nature of the undertaking of the Pacific Company? In several places in this instrument, it is called a "lease," and the parties are called "lessor" and "lessee"; while, on the other hand, in the record of the proceedings of the executive committee of the Pacific Company and of its stockholders, it is called an agreement "granting trackage rights" between Council Bluffs and South Omaha. But what it was styled by the parties does not determine its character or their legal relations, and in its interpretation the rule applies that "the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed." Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co., 143 U. S. 596, 609, 12 Sup. Ct. 479.

In Thomas v. Railroad Co., 101 U. S. 71, 79, MR. JUSTICE MILLER stated the real question to be "whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void."

And MR. JUSTICE BREWER, in his opinion on circuit, observed: "Neither the form of expression on the one hand, nor the name on the other, is conclusive. We must see what rights and privileges were in fact granted, what burdens and obligations assumed."

The contract provided that the Pacific Company hereby "lets the Rock Island Company into the full, equal, and joint possession and use of its main and passing tracks." The possession here spoken of was such possession as the Rock Island Company would have

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when its engines, cars, and trains were running over the tracks. The company had no possession before its trains came on the tracks, or after they had run off of them; and while its trains were on the tracks, its possession was only of the particular part occupied temporarily while running over them. Moreover, all trains were to be moved under the direction of an officer of the Pacific Company. The Rock Island trains, coming upon a Pacific track, immediately passed from the control of the Rock Island Company into that of the Pacific, and its officials were subjected to the orders of the Pacific's officers. And throughout the whole contract there does not appear to be a single provision which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company. The contract in this regard was really an agreement for trackage rights, for running arrangements,—a "terminal contract" with compensation on a "mileage" or "wheelage basis," rather than a lease.

The Pacific Company, in its answer, said that it had offered and now offered "to accept and transport all the cars and trains of the complainant, freight and passenger, to and from all points on the line of the said defendant described in said supposed contract, and thereby enable the complainant to maintain its business at Omaha and South Omaha, and to carry on exactly the same business that it could have carried on by the operation of its own trains by its own engines and by its own employees, as provided for in said supposed contract; and it says that it has offered, in the utmost good faith, to perform this service, immediately and at all times, for the said complainant, at a reasonable compensation, to be fixed in any fair, usual, and ordinary manner." It thus appears that the Pacific Company could do what it had contracted to do, and that the contention resolves itself into the proposition that there is a fundamental legal difference between authorizing the Rock Island to haul its trains with its own engines, and

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agreeing to haul them with the Pacific Company's engines, though in either event they were to be moved under the train dispatchers of the Pacific Company,—a difference we find ourselves unable to admit.

In *Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.*, 143 U. S. 596, 618, 12 Sup. Ct. 479, the Rio Grande Company had granted to the Rock Island Company the use of its terminal facilities at Denver, and it insisted that it could more conveniently handle the Rock Island trains with its own engines and crews than with those of the Rock Island. But this court, speaking through MR. JUSTICE BROWN, said: "It is obviously necessary to the harmonious working of the two systems that the general control and management of the yard should remain with the defendant; but it is not easy to see why that control may not be as well exercised over two switching crews belonging to two different companies as over two crews belonging to the same company. * * * It occurs to us that it would cause fully as much inconvenience to transfer the control of trains from the employees of one company to those of another, as such trains enter or leave the terminal yard, as it would be to permit the switching of such trains within the yard by the hands that brought them in or were to take them out. It appears that yards have been jointly operated in this manner in such large railway centers as Kansas City, Toledo, and Chicago without serious difficulty. We think that the same rule should also be applied to those employed in handling the freight. With reference to this, the decree of the court below provided that the plaintiff had a right to employ its separate switching crews and operate its own switching engines in the yards of the defendant company, under the sole and absolute supervision, direction, and control, however, of the yardmaster or other properly constituted officer or agent of the defendant, and subject to the orders and instructions of such yardmaster, etc., and in this there was no error."

Such being the nature of the contract, a contract frequently made between railroad companies, upon

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what reasonable ground should it be held invalid as an unlawful assumption of power?

The evidence shows that, between the bridge and South Omaha, some of the most thickly populated and densely settled portions of the city of Omaha are situated; that five railroads, engaged in transcontinental traffic, do their terminal business there, taking up and setting down passengers, collecting, unloading, and delivering freight; that a large part of the territory is filled with the tracks of the Union Pacific and Burlington Companies, and that there is scant room, if any, for another company, with the many tracks required for terminal business; that the whole territory is very valuable, densely populated, and filled with tracks; and that at South Omaha are stockyards and packing industries of great extent, furnishing the companies a vast volume of freight, and compelling the building of many tracks. If it were true that railroad companies could not, ordinarily, without the aid of a statute, grant running facilities over their tracks, even when such an arrangement would not interfere with their business, the application of so rigorous a rule to defeat a contract, as between the parties, in respect of tracks in the congested parts of large cities, where the entire use of them is not required by their owners, does not seem reasonable. It is well said by SANBORN, J., speaking for the circuit court of appeals: "Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other."

We think that it would be carrying the doctrine of *ultra vires* much too far to deny absolutely the competency of a railroad company, being a public highway, whose use is common to all citizens, to contract to give another running rights over its tracks without express statutory authority, and that, under proper circumstances,

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such a contract may well be held within its implied powers.

In *Lake Superior Ry. Co. v. U. S.*, 93 U. S. 492, MR. JUSTICE BRADLEY adverts to and comments on the fact that, in England and in this country, railroads, when first constructed, were by the legislatures and the people regarded and treated as public highways for the use of all who had occasion to run their vehicles thereon; and this is certainly so far true, in modern acceptance, that, being for the common use of the public, their owners are ordinarily competent to make contracts which will subserve such use.

But the determination of the existence of the power to grant running rights in this instance does not rest on these considerations alone. For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri river, its construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars, and trains over the bridge and the tracks between Council Bluffs and Omaha, and we think that South Omaha was included.

The original charter of 1862 required the construction of the Pacific road from the east bank of the river, and so impliedly authorized the company to bridge it, and the amendatory act of 1864 expressly gave the corporation authority "to construct bridges over said Missouri river." The bridge contemplated was for the company's use, as a part of its road, and no provision was made for other roads or other business, nor were any special means provided for the construction of the bridge.

In 1871 several roads had been built from the East to Council Bluffs, and others were building, and roads were in process of construction in Nebraska, with Omaha as their termini.

The Omaha Bridge act (16 Stat. 430) was then passed, by which, "for the more perfect connection of any rail-

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roads that are or shall be constructed to the Missouri river, at or near Council Bluffs, Iowa, and Omaha, Nebraska," the company was authorized to issue bonds not exceeding \$2,500,000, and to secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of congress." The bridge was "to be so constructed as to provide for ordinary vehicles and travel," and the company was authorized "to levy and collect tolls for the use of the same." The act further provided: "For the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges and to establish them as post roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto." The act of 1866, thus referred to (14 Stat. 244), is entitled "An act to authorize the construction of certain bridges and to establish them as post roads." It authorized the construction of nine different bridges, eight across the Mississippi river and one across the Missouri river. The first bridge provided for was to be constructed at Quincy, Ill., and by the first section it was made lawful for any person or persons, company or corporation, having authority from the states of Illinois and Missouri for that purpose, "to build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection with any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed the trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge under the limitations and conditions hereinafter provided."

The common object of both these acts plainly was

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the more perfect connection of roads running to the bridges on either side of the river. And this is in harmony with numerous acts of congress referred to in the opinion of the circuit court of appeals (15 St. 37 ; 16 Stat. 121, 173, 185, 473, 599 ; and many others); all of them indicating a settled policy that all structures of this character should allow connecting roads to cross them with their cars, trains, and engines. It is said that the reference to the act of 1866 should be confined to its second and third sections ; but, as the matters provided for in those sections were fully otherwise covered in the Pacific Railroad acts, that does not commend itself to us as a reasonable construction. But it is argued that, even if the Pacific Company were authorized to grant to the Rock Island Company the right to run its trains, with its engines, over the bridge, it was not empowered to grant the same rights over the tracks. The evidence shows that the tracks east of the bridge were upon the approach to the structure proper, and it appears from the maps that the depot at the west end of the bridge was more than half a mile distant. The act of 1871 provided that, for the more perfect connection of the roads east of the river with those west of it, the company might issue bonds, and secure the same by mortgage "on the bridge and approaches and appurtenances" ; and it would seem to be clear that the approaches on the west side, as well as on the east, must be regarded as part of the structure. Moreover, the act refers to "the tracks and depots required to perfect the same." A railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots, and other facilities for the public accomodation. And we consider Council Bluffs, Omaha, and South Omaha, under the facts, as necessarily embraced in the intention of congress. It is true that it appears that, from the depot to the point in South Omaha where the tracks of the companies connected, is about four miles ; but the scheme of congress was to accomplish the more perfect connection "at or near Council Bluffs, Iowa,

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and Omaha, Nebraska," and we think this distance reasonably within the terms of the act of 1871, liberally construed, as the act should be.

The legislation of 1862 and 1864 in respect of the Union Pacific Railway Company was under consideration in *Union Pac. Ry. Co. v. Hall*, 91 U. S. 343, 345, and it was said by MR. JUSTICE STRONG: "The scheme of the act of congress, then, is very apparent. It was to secure the connection of the main line by at least three branches, with the Missouri and Iowa railroads, and with a railroad running eastwardly from Sioux City in Iowa, either through that state or through Minnesota. An observance of this scheme, we think, will aid in considering the inquiry at what place the act of congress, and the orders of the president made in pursuance thereof, established the eastern terminus of the Iowa branch. From it may reasonably be inferred that the purpose of congress was to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the states on the east of the territory, and to provide for those connections within those states at points at or near their western boundaries."

On June 15, 1866, an act was approved (14 Stat. 66), "to facilitate commercial, postal, and military communication among the several states," carried forward as section 5258 of the Revised Statutes, which provided that "every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its roads, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freights, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

It is impossible for us to ignore the great public policy in favor of continuous lines thus declared by congress, and that it is in effectuation of that policy that

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such business arrangements as will make such connections effective are made.

We are of opinion that it was within the powers of the Pacific Company to enter into contracts for running arrangements, including the use of its tracks, and the connections and accommodations provided for; and we cannot perceive that this particular contract was open to the objection that it disabled the Pacific Company from discharging its duties to the public. By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy. If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy. Ability to perform its own immediate duties to the public is the limitation on its *jus disponendi* we are considering, and that limitation had no application to such a use as that in question.

The leading cases of *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094; *Oregon Ry. & Nav. Co., v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409; *Central Transp. Co., v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953; *U. S. v. Union Pac. Ry. Co.*, 160 U. S. 1, 16 Sup. Ct. 190,—arose upon instruments which dispossessed the corporations of all their property and of all capacity to perform their public duties. But we have no such case here.

The argument is pressed that the Pacific Company

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might become disabled by reason of the increase of business in the future, but the defendant asserts, in its answer that it is able to carry on the business of hauling complainant's cars "immediately and at all times," if it may do so with its own engines and on its own terms, and be permitted in the meantime to repudiate this contract. The proof wholly fails to establish that the contract involves any present inability, or any existing ground for apprehension in that regard, and shows that the bridge and tracks of the Pacific Company are fully adequate to meet much larger demands than are now, or within any reasonable time can be expected to be, made upon them under the contract. The country, as was said below, will grow in population and business, and the business of this particular corporation will increase, but with the increased volume of business come increased facilities for its transaction. Moreover, increase in the same ratio for the future as in the past is not to be expected, for new roads are constantly being built and other channels of transportation opened; and it can not be conclusively assumed that the common means of transportation 20 years hence may not be quite different from what they are at present. It will not do to hold this contract void, and allow defendant to escape from the obligations it assumed, on the mere suggestion that at some time in the remote future there is a possibility that the suggested contingency might arise. Should it happen, however; the courts are competent to relieve from the consequences of so radical a change of condition.

Objection is made that, by reason of the provision for referees in case of difference between the two companies as to the operation of trains, the full control of the Pacific Company of its road and franchises is taken away. If that stipulation were stricken out, the right of the Rock Island Company to use the tracks, subject to the reasonable management of the Pacific Company's officers, would still remain, and the contract itself contained a provision contemplating the possible invalidity of some one of the stipulations not of the essence of the

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contract. There does not appear to have been any specific contention in the circuit court or in the court of appeals that that particular clause was invalid; and, if it were, the power reserved in the decree was sufficient to permit an application to the court for its modification, and the substitution of the judgment of the court. We cannot hold that, if the particular clause were objectionable, the contract would be invalidated as a whole; and it is too late to ask a reversal on the ground that the clause itself is not enforceable.

We do not feel called upon to enter at length upon other objections urged by appellants' counsel. One of them was that the Rock Island and St. Paul Companies derived no power from the laws of Nebraska to enter into the alleged contract, because they had not complied with the statutes of the state in that behalf. After the testimony was closed, and as the final hearing commenced, defendants moved the court to permit the introduction of the evidence upon which this contention is based. This was objected to by complainants, the objection sustained, and defendants excepted. We concur in the view of the circuit court of appeals, which held that there was no abuse of discretion in the court below in denying the motion, and did not consider the rejected evidence or the argument based upon it. The Rock Island Company built its road from South Omaha to Lincoln as vested with the corporate power to do so, and it contracted as in the possession of the power as a corporation existing in and under the laws of Nebraska. The state appears to have been content, and the contract, not being necessarily beyond the scope of the powers of the corporation, must, in the absence of proof to the contrary, be deemed valid.

Nor can the contract be held invalid because, within its prescribed duration, the charter of the Rock Island Company expired by its terms. The contract was carefully drawn in view of such expiration of the several corporate existences of the parties to it, who bound themselves to take such steps as might be necessary to continue the

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contract in force. And, as observed by the court of appeals, the contingency that the Rock Island Company "will cease to exist and leave neither assigns nor successors is far too remote to have any influence upon the validity of this contract." 10 U. S. App. 192, 2 C. C. A. 174, 51 Fed. 309.

It is also said that the contract was void so far as the Republican Valley Railroad Company was concerned, because without consideration, inasmuch as the Rock Island Company was to pay the Pacific Company for the possession and use of the railway and appurtenant property between Lincoln and Beatrice to the Pacific Company, and so the Valley Company as an independent corporation received no compensation. But the stockholders of the Valley Company entered into the covenants in question, and as each of its incorporators was an officer or employee of the Union Pacific Company; its road was built with the funds of that company; every share of its stock ever issued was taken, held, or voted by some officer or employee of that company in trust for it; the officers of the two companies had always been the same, and in their operation no distinction had ever been made between the two roads; and their earnings had gone into, and their expenditures been paid from, a common treasury,—we think there is no merit in the objection that, for the reason given, the Valley Company was not bound by its covenants.

But it is earnestly contended that the Pacific Company had no power, under its charter as a federal corporation, to operate any other line of road than those lines which it was specifically authorized by congress to construct, and that it was prohibited, under the constitution and laws of Nebraska, from doing so, and, therefore, that it could not obligate itself to use, and to pay to the Rock Island Company compensation for the use of, the road between South Omaha and Lincoln.

It does not appear that this point was called to the

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attention of the circuit court, or decided by it ; nor, in the errors assigned to the decree of the circuit court in the circuit court of appeals was there any error attributed to the decree in this particular ; nor did that court pass upon any such question. It is, indeed, admitted that the point is raised for the first time in this court. We have to determine, on this appeal, whether, in our judgment, the circuit court of appeals did or did not err, and affirm or reverse accordingly. It is true that our decision necessarily reviews the decree of the circuit court in reviewing the action of the court of appeals upon it, and, under the statute, our mandate goes to the circuit court directly ; but it is, notwithstanding, the judgment of the circuit court of appeals that we are called on primarily to revise. It will be seen, then, that the judgments of the courts of appeals should not ordinarily be re-examined on the suggestion of error in that court, in that it did not hold action of the circuit court erroneous, which was not complained of. We will, however, make a few observations on the point thus tardily presented.

Jurisdiction of
Supreme Court.

The eighth section of the eleventh article of the constitution of that state provided that no railroad corporation of any other state or of the United States, doing business in Nebraska, should be entitled to exercise the right of eminent domain, or have power to acquire right of way or real estate for depot or other uses, until it should have become a corporation of the state, pursuant to the constitution ; but we do not see what that provision has to do with this question. The stipulations of the contract relating to the use of the Rock Island tracks between South Omaha and Lincoln by the Pacific Company did not embrace the acquisition of right of way or real estate or the exercise of the power of eminent domain by the latter.

By the contract the Rock Island Company gave the Pacific Company "the right and privilege to move and operate its trains over the tracks," and nothing more,

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and it was provided that the Pacific Company should do no business at intermediate points. The Pacific Company was to run its trains over the Rock Island tracks 45 miles, and it agreed to pay a fair compensation for doing so. It was perfectly competent for the Pacific Company to contract to deliver at Lincoln freight and passengers taken up at Omaha; and, in carrying out such contract, it could make deliveries in car loads, just as well as in small parcels. It follows that its cars might be run through, and the fact that, under this contract, the Pacific Company would haul its cars with its own engines amounts to no more than a mere method of doing the business. And as, when it contracts for deliveries beyond its own line, it must pay the connecting company for its services, that compensation might be fixed by the parties upon any basis they agreed to. Here it agreed to pay a certain sum per mile for the mileage over which its trains run, and the difference between that and any other mode of payment did not go to the powers of the company. Where a corporate contract is forbidden by a statute, or is obviously hostile to the public advantage or convenience, the courts disapprove of it; but when there is no express prohibition, and it is obvious that the contract is one of advantage to the public, the rule is otherwise. As remarked in *Navigation Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379: "Although the contract powers of railroad companies are to be restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may be useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers which it is its duty to transport. Courts may be permitted, where there is no legislative prohibition shown, to put as favorable construction upon such exercise of power by railroad companies as is necessary to promote the success of the company within the powers of its charter, and to contribute to the comfort of those who travel thereon."

Contracts between
Railroad Corpora-
tions.

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And that principle is applicable to the transportation of through freight and passengers over connecting lines.

Under the laws of Nebraska, railroad companies are clothed with ample power to make leases, or any arrangements for their common benefit, consistent with and calculated to promote the objects for which they are created. Comp. St. Neb. 1887, p. 248, c. 16, § 94. There is nothing in the charter of the Pacific Company that prohibits such an arrangement as this in controversy, unless by implication; and as by it the public interest was subserved, that company reached its own lines by a shorter route, and accommodated its own through freight and travel, we are not prepared to hold that it was invalid.

These observations also apply to the clause of the contract in respect of the road between McPherson and Hutchinson, but it should be added that that reach of road was held and operated by the Kansas Company, which was a Kansas corporation. The Union Pacific Railway Company was formed by the consolidation of the Union Pacific Railway Company, a federal corporation, the Denver Company, a Colorado corporation, and a corporation originally named the Leavenworth, Pawnee & Western Railway, afterwards called the Union Pacific Railway, Eastern Division, and lastly the Kansas Pacific Railway. The latter company, by its first name, was incorporated under the laws of the territory of Kansas, and, upon the admission of Kansas into the Union, became a corporation of that state. The acts of Congress of 1862 and 1864 clothed it with new franchises, but did not deprive it of its powers as a state corporation, which could be exercised by the consolidated company in Kansas so far as not in derogation of its federal powers. And Kansas corporations were duly empowered to enter into leases and the like by the state laws. 1 Gen. St. Kan. p. 443, c. 23, § 112.

2. Was the contract, if within its powers, duly authorized by the Pacific Company? No question arises but that the contract was executed in due form, and, as to the manner in which its execution was authorized,

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the facts appear to be : On April 22, 1890, the executive committee passed the resolution approving the contract, and authorizing the president of the company to execute it, and on the 30th of the same month the stockholders, at their regular annual meeting, voted to approve the contract and the action of the executive committee relative thereto. The board of directors never formally acted. As soon as the contract was executed, the Pacific Company required the Rock Island Company to make proper connections between McPherson and Hutchinson, which was done, and the Pacific Company commenced to run over those tracks, and continued to do so until after the disputes between the two companies became flagrant. On the other hand, the Rock Island Company commenced the construction of its road between South Omaha and Lincoln, and of the stations and yards at Lincoln, on the lands of the Republican Valley Company. Appellants contend that the action of the stockholders and the executive committee was ineffectual, because the board of directors was the only body that could authorize the president and secretary to make the contract. The contract appearing on its face to have been duly executed, and the parties having entered upon its execution, necessarily with full knowledge on the part of the board of directors of the Pacific Company, the board would be presumed to have ratified it, although it in fact took no affirmative action in the matter. *Pennsylvania R. Co. v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 381, 9 Sup. Ct. 770.

Ratification of Corporate Contracts.

When, by the charter of a corporation, its powers are vested in its stockholders, and this was the common-law rule when the charter was silent, the ultimate determination of the management of the corporate affairs rests with its stockholders, and the charter of the Pacific Company did not commit the exclusive control to the board of directors.

By the first section of the act certain persons named, together with five commissioners, to be appointed by the secretary of the interior, were, with their succes-

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sors, created a body corporate and politic, with certain powers, which were to determine after the company was fully organized, "and thereafter the stockholders shall constitute said body politic and corporate." It was further provided: "Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules and regulations as they shall deem needful and proper, touching the disposition of the stock, property, estate and effects of the company not inconsistent herewith, the transfer of shares, the terms of office, duties, and conduct of their officers and servants, and all matters whatsoever which may appertain to the affairs of said company." The same section provided that the directors "shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock after due notice, at such times and in such proportions as they may deem necessary to complete the road and telegraph within the time in this act prescribed."

Acting under the authority conferred upon them by the charter, the stockholders of the Pacific Company adopted by-laws for the government of the corporation and for the regulation of its business affairs. By section 2 of article 4 of the by-laws it was provided: "The board of directors shall have the whole charge and management of the property and effects of the company, and they may delegate power to the executive committee to do any and all of the acts which the board is authorized to do, except such acts as by law and these by-laws must be done by the board itself." Thus, the stockholders authorized the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized to do. The executive committee derived its authority from the stockholders through the board of directors. By section 2 of article 5 of the by-laws it was provided: "The

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executive committee shall have, and may exercise by a majority of its members, all the powers and authority which from time to time may be delegated to said committee by the board of directors." As early as March 15, 1877, the board of directors adopted a resolution, "that while the board of directors is not in session, the full power thereof, under the charter and by-laws, is hereby conferred upon the executive committee, and the proceedings of said committee at its last meeting are hereby ratified and confirmed." In 1879 the form of resolution adopted by the board was as follows: "Resolved, that while the board of directors is not in session, the full power under the charter and by-laws be, and it is hereby, conferred upon the executive committee." Similar resolutions were passed every year up to April 30, 1890, when the board of directors passed substantially the same resolution which they had been in the habit of adopting from year to year. It was shown that the meetings of the executive committee were frequent, but that the board usually met only twice a year, the business of the company being more conveniently transacted by the committee.

The contracts in question were in the proper form, signed and executed by the proper executive officers, and attested by the corporate seal. They were ap-

proved and authorized by the executive committee, which committee had all the powers of the board, and were ratified, approved, and confirmed by the stockholders at their regular annual meeting. This was sufficient to bind the Pacific Company, although no formal action by the board was had. But it is argued that this cannot be so because of the peculiar relation which the government directors of the Pacific Company bore to the corporation, differing from that of other directors; and the absence of the government director, who was a member of the executive committee, from the meeting which approved and authorized the contracts, is also commented on, as if, thereby, the action of the executive committee in that behalf was rendered ineffective.

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By the first section of the act of 1862 not less than thirteen directors were to be elected and two to be appointed by the president of the United States, "who shall act with the body of directors, and be denominated directors on the part of the government."

The thirteenth section of the act of 1864 is as follows :

"That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen ; and the number of directors to be appointed by the president shall be five ; and the president shall appoint three additional directors to serve until the next regular election, and thereafter five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the secretary of the interior, in answer to any inquiries he may make of them, touching the condition, management and progress of the work, and shall communicate to the secretary of the interior at any time such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road, whether built or surveyed ; and while absent from home, attending to their duties as directors, shall be paid their actual travelling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide."

We see nothing in the provisions relating to government directors which makes it indispensable that the board should formally authorize such contracts as the one under consideration. Congress did not vest in the government directors any peculiar powers. They had the same powers as other directors, and no more ; but, as government directors, they were to make reports to the secretary of the interior in respect of the affairs and matters mentioned in the act of 1864. They could not, either by a negative vote, or by absenting themselves

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from the meetings, prevent the transaction of the necessary business of the company, in which they were entitled to participate on the same terms as their associates. Congress did not look to any action of theirs for the protection of the public interests, but sought to secure those interests by specific legislation. Thus, it was provided, by the act of 1862, that patents for lands and government bonds should not be issued to the company until the road had been constructed, examined, and approved by the commissioners, and the facts certified to the president and secretary of the treasury; and a forfeiture of the rights belonging to the company and the lands granted to it, in case of default on its part to redeem the bonds, or any of them, when required to do so by the secretary of the treasury, in accordance with the provisions of the act, was also provided for.

The joint resolution for the protection of the interests of the United States (16 Stat. 56); the appropriation act of March 3, 1873 (17 Stat. 485, 508); the Thurman act (20 Stat. 56); the act amendatory of the fifteenth section of the act of 1862 (18 Stat. 111); the act providing for a commission to investigate the transactions of the company (24 Stat. 488),—are examples of such legislation. And it was through them, and not through the agency of the government directors that congress sought to protect the interests of the govern-

ment and the public. We regard the position as wholly untenable that this provision for government directors took the corporation out of the general rule that, except in cases where the charter imposes a limitation, the stockholders are the proper parties to take final action in the management of the corporate affairs.

3. The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach.

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It is not contended that multiplicity of suits to recover damages for the refusal of defendants to perform would afford adequate relief, nor could it be; for such a remedy, under the circumstances, would neither be plain nor complete, nor a sufficient substitute for the remedy in equity, nor would the interests of the public be subserved thereby. But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing, and the provision for referees in certain contingencies is a mere matter of detail, and not of the essence of the contract.

Specific Performance.

Provision for Referees.

It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies "so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated," and "has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed." Pom. Eq. Jur. § 111.

We regard the case of *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, as determining that this contract was one within the control of a court of equity to specifically enforce. In that case the St. Louis, Kansas City & Colorado Railroad Company acquired by succession, under a contract, the right of running its trains over the line of the Wabash Company from a point on the northern line of Forest Park, through the park, and into the Union Depot at St. Louis, together with the

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right to use side tracks, switches, turnouts, and other terminal facilities. It was a continuing right, and unlimited in time; and the contract contained provisions regulating the running of trains, and prescribing the duties of superintendents, trainmasters, and other officers. The objections that are urged against the specific performance of the contract under consideration were urged against the specific performance of that contract, and were severally overruled; and it was held that nothing short of the interposition of a court of equity would provide for the exigencies of the situation.

This case was cited with approval in *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 900. The contract there was one for the use by Harrison Bros. & Co. of a wire of the Franklin Telegraph Company between Philadelphia and New York. It appeared that Harrison Bros. & Co. had been in the possession of a certain valuable contract with the Insulated Lines Telegraph Company, to the rights of which company the Franklin Telegraph Company had succeeded. Desiring to have that contract terminated, the Franklin Company entered into a new contract with Harrison Bros., by which the Franklin Company agreed to allow Harrison Bros. the right to put up, maintain, and use a telegraph wire on the poles of the Franklin Company. At the expiration of ten years thereafter the wires were to become the property of the telegraph company, after which time the telegraph company was to lease the same to Harrison Bros. for \$600 per annum, payable quarterly, and with all the other terms and conditions as they existed before. The ten years having expired, Harrison Bros. continued to use the wire, paying the stipulated sum of \$600 per annum therefor; but after this had gone on for about three years the telegraph company served notice on Harrison Bros. putting an end to the agreement, whereupon Harrison Bros. filed a bill to restrain the telegraph company from terminating the contract, and to have the same specifically enforced, and this court held that the contract was one proper for specific performance.

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The same rule was laid down in *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.*, 144 N. Y. 152, 39 N. E. 17, where many authorities are cited.

In *Railroad Co. v. Alling*, 99 U. S. 463, this court directed an injunction against the Cañon City Railway Company from preventing the Denver road from using the right of way through the Grand Cañon, and said: "If, in any portion of the Grand Cañon, it is impracticable or impossible to lay down more than one roadbed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the act of March 3, 1875, to use the same roadbed and track, after completion, in common with the Denver Company."

In the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, the express companies sought to restrain the railway companies from refusing to carry express matter on the terms of contracts which had expired, which the court held could not be done, and it was said: "The legislature may impose a duty, and, when imposed, it will, if necessary, be enforced by the courts; but, unless a duty has been created, either by usage, or by contract, or by statute, courts cannot be called on to give it effect."

It was objected, in *Joy's Case*, that the court was proposing to assume the management of the railroad "to the end of time"; but MR. JUSTICE BLATCHFORD, speaking for the court, responded that the decree was complete in itself, and that it was "not unusual for a court of equity to take supplemental proceedings to carry out its decree, and make it effective under altered circumstances." And the court applied the principle that considerations of the interests of the public must be given due weight by a court of equity, when a public means of transportation, such as a railroad, comes under its jurisdiction. "Railroads are common carriers, and owe duties to the public," said MR. JUSTICE

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BLATCHFORD. "The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions."

Clearly, the public interests involved in the contracts before us demand that they should be upheld and enforced.

4. Doubtless a court of equity may refuse to decree the specific performance of a contract, if it be unconscionable, or bad faith in the parties seeking its enforcement be shown, or duress or fraud appear, or if it be unjust or inequitable, or if the decree would produce results so inequitable as to be incompatible with the proper exercise of the jurisdiction. But here it appears that the contracts were solicited by the Pacific Company, were fairly made on terms substantially proposed

by itself, and that their violation by that company was unjustifiable. The contracts were approved promptly and with unanimity. The consideration appears to have been fair and reasonable. The St. Paul and Rock Island Companies abandoned their previous enterprise in reliance on them. They entered upon the performance of the contracts, and large

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sums of money were expended in carrying them out. The conduct of the Pacific Company was not such as to commend itself to a court of equity, and we can do no better than to quote from the opinion of MR. JUSTICE BREWER, in deciding the case on circuit: "It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action."

Decrees affirmed.

MR. JUSTICE SHIRAS, dissenting.

To make arrangements with other railroad companies, whereby they are permitted to make use of the Missouri River bridge, and of the tracks and station houses within the cities of Omaha and South Omaha, may be fairly held to be within the range of the general authority of the Union Pacific Railway Company. Such contracts are not unusual, and are calculated to promote the convenience of the public and the welfare of the railroad companies which enter into them; and, if the contracts in question presented such a case, I should have no difficulty in affirming their validity. But, as I read them, they go far beyond such supposed arrangements, and contain covenants and stipulations which bring them within the condemnation of our previous decisions.

What is granted to the Rock Island Railway Company and to the St. Paul Railway Company is not a mere right or privilege, for a reasonable compensation, and subject to the rules and regulations of the Union Pacific, to run their trains over the bridge and into and out of the city stations, but "the full, equal, and joint possession and use of the main and passing tracks" belonging to the lessor company, and extending from

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Council Bluffs on the East side of the Missouri river to the town of South Omaha, a distance of ——— miles. Nor is the power of control and management reserved to the Union Pacific Railway Company. The words of the contract, in that particular, are as follows :

“Schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly-authorized officers of the lessor and lessee companies by which such railways shall at the time be operated. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege, and advantage to trains of the same class operated by the lessor and lessee, and shall secure to neither any preference or discrimination against the other. They shall be executed, and all trains moved, under the immediate direction of the superintendent or the officer of the lessor company. If the parties cannot agree upon the adoption of any schedule, rules, or regulation, or as to the modification of any one existing, either party may demand a decision of such controversy by referees as hereinafter directed. The referees are hereby invested with power to prescribe schedules, rules, and regulations, and to modify existing ones; and, in case of willful disregard by either party of the rights of the other, to award damages to the party injured for injuries sustained because of such willful act.”

The legal effect of these contracts is to create a joint ownership, for 999 years, of an important portion of the Union Pacific's railroad and appurtenances, “a full, equal, and joint possession of its tracks,” and a subjection to rules and regulations prescribed by the duly-authorized officers of the lessor and lessee companies, and, in case of disagreement, subjection to the decision of referees, mutually appointed, invested with power to prescribe schedules, rules, and regulations, and to modify existing ones.

These contracts, in my opinion, are plainly void, within the principles of the following cases: Thomas v. Railroad Co., 101 U. S. 71; Branch v. Jesup, 106

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U. S. 468, 1 Sup. Ct. 495; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478. The doctrine of those cases may be sufficiently expressed by the following paragraph, taken from the opinion of MR. JUSTICE MILLER in the case of Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 309, 6 Sup. Ct. 1094.

"We think it may be stated, as the just result of these cases, and on sound principle, that, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchise, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

To which may be added the following observations of MR. JUSTICE GRAY in the very recent case of Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 48, 11 Sup. Ct. 478:

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interests of the stockholders not to be subjected to risks which they

have never undertaken ; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

In commenting upon that clause of the contracts in which the Union Pacific Company "lets the Rock Island Company into the full, equal, and joint possession and use of its main and passing tracks," the opinion of the court states that "the possession here spoken of was such possession as the Rock Island Company would have when its engines, cars, and trains were running over the tracks. The company had no possession before its trains came on the tracks, or after they had run off of them ; and, while its trains were on the tracks, its possession was only of the particular part occupied, temporarily, while running over them."

But this view, I submit, overlooks the necessary meaning of the language of the contracts. The possession whose right is given is described as full—that is, entire, not imperfect, or insufficient ; as equal—that is, as great as that of the lessor company ; as joint—that is, united in interest and obligation with the other party. If doubt could be entertained of the meaning of language so explicit, such doubt would be removed by the other express provisions that the "schedule of rules and regulations shall, as nearly as may be practicable, accord equality of right, privilege, and advantage to trains of the same class operated by the lessor and lessee, and to trains of a superior class operated by either, a preference over trains of an inferior class operated by the other. * * * All rules and regulations shall be reasonable and just to both lessor and lessee, and shall secure to neither any preference or discrimination against the other."

Again, the opinion states that, "moreover, all trains were to be moved under the direction of an officer of the Pacific Company. The Rock Island trains, coming upon a Pacific track, immediately passed from the control of the Rock Island Company into that of the Pacific, and its officials were subject to the orders of the Pacific's officers."

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I am unable to so read any provision of the contract. On the contrary, as already stated, it is expressly stipulated that "the schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly-authorized officers of the lessor and lessee companies by which such railways shall at the time be operated"; and, if the parties cannot agree upon such rules and regulations, then mutually appointed referees shall exercise authority to "prescribe schedules, rules, and regulations, and to modify existing ones." The plain meaning, as I think, of these contracts is that the Union Pacific Railway Company has thereby parted with its sole and absolute control of those portions of its road and tracks that are embraced within the scope of the contracts, and with the sole and absolute power to exercise its franchises to occupy, possess, and operate such portions of its road, and has agreed to participate, for a period of 999 years, with other railway companies, in the full, joint, and equal possession of those portions of its road, in their physical aspect, and to confer upon such other companies the right to join, on equal terms, in the making of all rules and regulations pertaining to the use and management thereof. When a contract provides for the possession of a railroad, and for its operation by rules and regulations, it has covered everything that exists,—the road as a physical structure, and the franchises to operate it by rules and regulations.

It is true that the contract provides that the rules and regulations "shall be executed, and all trains moved under the immediate direction of the superintendent or other officer of the lessor company." But the duties of such an officer are subordinate. He is to carry out the rules and regulations prescribed jointly and equally by the lessor and the lessee companies, and the meaning and effect of the provision in question is to prevent the confusion that would result if there were two superintendents to enforce the same rules over the same portions of railroad.

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The opinion of the court disposes of the cases hereinbefore cited by the observation that they arose upon instruments which dispossessed the corporations of all their property, and of all capacity to perform their public duties, and that such is not the case here.

But the reason why the contracts in those cases were held void was, not because they embraced all the property of corporations, but because the companies sought to part with the possession and control of their property without legislative authority for doing so. Can that be a sound view which, while admitting that the Union Pacific Railway Company is forbidden to lease the possession and control of its road to another company, without authority expressly given, yet would hold that that company may, without such authority, part with the possession and control of one-half or of any appreciable part of its road? Can it be maintained that, while the Union Pacific Railway Company cannot lease its railroad from Council Bluffs to Ogden, it may contract with the Rock Island Railway Company to give it joint and equal possession and management of its road between those points? And, in point of principle, if such a contract would be void if embracing the road between Council Bluffs and Ogden, how could it be declared valid if embracing the road between Council Bluffs and South Omaha?

The views of the majority seem to me to overlook the essential question, and that is, the power of the Union Pacific Railway Company to part with its road and franchises, temporarily or forever, in whole or in part. A contract by that company to share its road and those powers, called "franchises," which are necessary to operate it, is just as much forbidden by the principle of the cases as a contract to lease its road as an entirety. The objection to an irrevocable contract for 999 years, that the Union Pacific Railway Company may hereafter need to use its tracks and franchises in their entirety, is not satisfactorily met by the suggestion that, in such event, the courts can in some way relieve the company from the contract. It is

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not easy to see how an engagement now held valid can be hereafter dispensed with.

The Union Pacific Railway does not hold and exercise the powers conferred on it by congress, subject to the control and approval of the courts. Nor is it competent for the courts to enforce or relax, at their will, and according to their views of expediency, the obligations of contracts into which the railway company may have entered.

Other provisions of these contracts which seek to subject the Omaha & Republican Valley Railway Company and the Salina & Southwestern Railway Company to the use of the Rock Island and St. Paul Companies, and which render the Union Pacific Railway Company liable as lessee of railroads owned by the Rock Island Company, are, in my judgment, equally without authority of law. But it is scarcely worth while to consider them minutely. As this is a proceeding to enforce specific performance of the entire contract, invalidity of any important part of the contract, but for which it would not have been entered into at all, is enough to defeat the bill.

It is scarcely necessary to say that, if these contracts were void for the reasons given, no action taken under them would justify a court of equity in enforcing them. As was said in *Thomas v. Railroad Co.*, above cited: "In the case of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty—a duty both to the stockholders and the public—to rescind and abandon the contract at the earliest moment; and the performance of that duty, though delayed for several years, was a rightful act when done, and could give the other party no right of action, and that to hold otherwise would be to hold that any act performed in executing a void contract makes all its parts valid, and that, the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corpo-

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ration, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, as far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, money or property which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

I think that the judgment of the circuit court of appeals should be reversed, and the cause remanded to the circuit court, with directions to set aside its decree and dismiss the bill.

MR. JUSTICE GRAY likewise dissented.

RUDIGER

v.

CHICAGO, ST. P., M. & O. R. Co.

(*Supreme Court of Wisconsin, October 13, 1896.*)

Action against Railway Company for Death by Wrongful Act.—A state statute provided that "whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided that such action shall be brought for a death caused in this state, and in some court established by the

**Note.*—Where injury was inflicted or death occurred out of the state see 3 Rap. & Mack's Digest p. 781. Notes 18 Am. & Eng. R. Cas. 191; 23 Id. 382; 48 Id. 516; 41 Id. 514, 521.

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constitution and laws of the same." *Held*, that such statute rendered an action brought under it local, and limited the action to cases where death was caused by acts committed or occurring within the state, without regard to whether the death occurred within or without the state.

APPEAL from Dunn county circuit court. *Affirmed*.

The plaintiff brought this action in her representative capacity as administratrix of the estate of her deceased husband, Leopold Rudiger, to recover damages sustained by his death, occurring at St. Paul, Minn., but which was caused by the wrongful, careless, and negligent acts and omissions of the defendant, occurring upon the line of its railway, between Roberts and Hammond, in Wisconsin, and while he was there a passenger on its train of cars. A demurrer to the plaintiff's complaint upon the ground that it did not state facts sufficient to constitute a cause of action was overruled, and the defendant appealed from the order. The only question presented is whether a death occurring outside this state, but resulting from wrongful and negligent acts within the state, is embraced within the statute (section 4255, Sanb. & B. Ann. St.)

L. K. Luse, for appellant.

J. R. Mathews, C. T. Bundy, and T. F. Frawley, for respondent.

PINNEY, J. (after stating the facts). Section 4255, Sanb. & B. Ann. St., provides that: "Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." No action would lie by the common law for

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wrongfully causing the death of a human being, although the wrongful act might, under some circumstances, give a right of action to others, arising out of some relation existing between the deceased and the party suing. In such cases the right of action cannot spring from the death itself, but from the effect of the neglect or wrongful act upon rights growing out of such relations. For any personal injury inflicted on one in his lifetime the right of action therefor at the common law was extinguished by his death. Cooley, Torts, § 262, and cases cited. In *Whitford v. Railroad Co.*, 23 N. Y. 470, it was said that the authorities "settled the question that, where injuries are inflicted causing the death of a person, the right of action for such injuries dies with the person upon whom they are inflicted. The exceptions are that a husband may maintain a civil action for injury to the wife, so far as medical services and funeral expenses were incurred, or a parent for the loss of a child's services up to the time of its death; but not for the loss of life." In *Hollenbeck v. Railroad Co.*, 9 Cush. (Mass.) 480,—an action under a statute providing for the survival of actions of trespass on the case for damages to the person, and that, "in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were alive," in effect like the statute of this state (sections 2803, 4253) on the subject of survival of actions,—SHAW, C. J., says: "It is perfectly well settled as a rule of common law that all rights of action for injury to the person die with the person, and it follows, therefore, that if either the plaintiff or defendant should die before judgment, in existing actions brought to recover, such actions must abate, and, if none had been brought by the party injured, none could be commenced by his personal representative. It was the obvious purpose of this statute to reverse this rule of law, and to provide that the right of action should survive, as in case of damages to property, and, of course, be liable to be

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prosecuted by or against an executor." It was also held, under this statute, that if a death was instantaneous, and simultaneous with the injury, no right of action accrued to the person killed, and, of course, none to which the statute would apply. *Hollenbeck v. Railroad Co.*, *supra*. The statute under consideration was enacted to supply the manifest defect in the law as it thus existed, and to provide a remedy against the wrongdoer, if death ensued in consequence of his negligent or wrongful act. It may well be conceded that the remedy provided depends entirely upon this statute. The question is as to its scope and effect. The statute provides (Rev. St. §§ 4255, 4256) that a right of action in such cases shall exist in favor of the personal representative of such deceased person, and for a distribution of the recovery where "the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain the action, and recover damages in respect thereof," and "the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." This is all of the statute declaratory of and defining the right of action. The cause of action is obviously the wrongful act or neglect. The proviso contains two limitations upon the right to prosecute the action, and requires (1) that "such action shall be brought for a death caused in this state, (2) in some court established by the constitution and laws of the same." It is not made of the substance of the right of action that the death should have occurred within the state, but the gist and substance of the provision is that the death shall have been caused by a wrongful act, neglect, or default occurring in this state; but in what state the damages ensued thereon was not, we think, intended to be made material. In the construction of the act we ought not to restrict its beneficent provisions by a strained or fanciful construction, which a consideration of the former state of the law, and the defect to be remedied, satisfies us was not intended. The statute is a reme-

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dial one, and should be construed, not strictly, but so as to advance the remedy, and suppress the supposed wrong and injustice existing under the former condition of the law. The legislature doubtless had in view the result ensuing from such wrongful act, neglect, or default, and, if it had been intended that the action should not be maintained when caused by a wrongful neglect or default occurring in this state if the consequence or death occurred outside of the state, it seems reasonable to suppose that they would have expressly so provided. In many cases arising under similar acts, it has been held that the action could not be maintained if the fatal injury occurred outside of the jurisdiction of the state in which the statute relied on was enacted; that, if it appears that the injury occurred outside of the state, and it did not appear that the law of such state gave such a remedy, there could be no recovery. 1 Shear. & R. Neg. § 131; Cooley, Torts, § 266, and cases in notes; *Whitford v. Railroad Co.*, 23 N. Y. 465; *Debevoise v. Railroad Co.*, 98 N. Y. 377. But in New York it is now settled that the action may be maintained in a state other than where the injury occurred, if the statutes of such state conferred substantially the same remedy as the statutes of the latter state. And in *Dennick v. Railroad Co.*, 103 U. S. 11, it was held that the right of action, under such a statute, in the absence of contrary provisions, is transitory, and may be asserted in any circuit court of the United States having jurisdiction of the subject-matter and the parties; and that where A. died in New Jersey, from injuries received in that state, for which, if death had not ensued, the party inflicting them would have been liable for damages, and the statute of that state provided that in case of death such action might be brought against the party by the personal representative of the deceased, a recovery by an administratrix of A., appointed in New York, was sustained; the action having been commenced in the state court of that state, and removed to the circuit court of the United States by reason of the diverse citizenship of the parties. In that case the stat-

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ute law of both states and their public policy were substantially identical. The object and effect of the proviso to our statute was to render the action local, and limit it to cases where death was caused by acts committed or occurring within the state, without regard to whether the death occurred within or without it. The foundation of the action is obviously the wrongful or negligent act or default which caused the injury, and which is in contravention of the law of the state. This, as we have said, is the substantive ground of action. *De Ham v. Railroad Co.* (Tex. Sup.) 23 S. W. Rep. 381; *Hegerich v. Keddie*, 99 N. Y. 267; *McCarty v. Railroad Co.*, 18 Kan. 46; *Needham v. Railroad Co.*, 38 Vt. 294. Reliance was placed upon a casual remark by FIELD, J., in *Railroad Co. v. Whitton*, 13 Wall. 270, 285, that "it is undoubtedly true the right of action exists only by virtue of the statute, and only in cases where the death was caused within the state. The liability of the party, whether a natural or artificial person, extends only to cases where, from certain causes, death ensues within the limits of the state." The question we have been considering was not involved in that case, and the remark was *obiter*. For the reasons stated, we cannot allow it to control our judgment as to the proper construction of the statute. The order overruling the demurrer is correct. The order of the circuit court is affirmed.

LOUISVILLE & N. R. Co.

v.

BERNARD.

(*Court of Appeals of Kentucky, Nov. 19, 1896.*)

Injuries to Trespasser.*—Recovery cannot be had by a trespasser for injuries received in an attempt to board a moving freight train, because a brakeman, in preventing him, without undue violence, from doing so was the cause of his injuries.

*See note at end of case.

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APPEAL from Simpson county circuit court. *Reversed.*

J. A. Mitchell, H. W. Bruce and Wm. Lindsay, for appellant.

Goodnight & Roark, for appellee.

LEWIS, J. Appellee, accompanied by eight or ten boys and young men, he being then about full grown, went from Franklin, where they resided, to Woodman, a town about eight miles distant on line of appellant's road, where there was a colt show and picnic. But, failing to return on the afternoon passenger train, they, about nightfall, walked towards Franklin to a water tank one and a half miles from Woodman, in order to ride upon a freight train, arrival of which they awaited three hours. As that train, after taking water, was standing appellee attempted to board a car, upon which was an oil tank, but was prevented by one of the brakemen; and, either in his effort to get down, or being shoved by the brakeman, he fell, and a car wheel ran onto him, partly tearing the flesh from one of his heels, and otherwise so injured him that he was confined at his home, unable to do work for several months, besides suffering considerable pain. According to his statement, which was corroborated by two or three of his companions, he had placed one foot upon the box of a car wheel, the other upon an iron bar under the car, and grasped with both hands an iron rod or rail, which extended along the side of the oil-tank car, in the effort, and was about to spring upon top of it, when the brakeman, without speaking to him, loosened his grasp upon the rod and shoved him down. The brakeman, however, testifies he merely put his hands upon appellee's arms, and forbade his getting on the car, when he desisted. That the purpose of appellee and his companions in going to the water tank was to get a free ride back to Franklin, with or without permission of the conductor in charge of the freight train, is plain. No one of them spoke to the conductor, or was seen by him, for he was in the caboose at the

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rear end of the train which was composed of 25 or 30 cars, and, therefore, 200 or 300 yards long. Besides, though it was stationary five or six minutes while taking water, neither appellee nor any of his companions attempted to get aboard the train until it was about to start, or was actually starting. It is true he, while admitting on cross-examination, that he did not have permission of the conductor to ride on the train, stated in a general way he got permission from the brakeman. But that statement is utterly inconsistent with his previous one that nothing was said by either himself or the brakeman at the time he was shoved or made to get off the box of the car wheel. Besides, he knew that, if any other brakeman had given such permission, it was in violation of the rules of the company, and in disregard of authority of the conductor who had charge of the train; for, if he and his companions had intended to pay their fare, they would have gone to the caboose, where the conductor was, and whom they seemed to carefully avoid. The evidence is satisfactory to us that, when appellant attempted to get upon the oil-tank car, he was, in law and fact, as the lower court in instructions to the jury correctly assumed him to be, a trespasser, and as such he must be treated by this court, in determining the relative rights and duties of the parties to this litigation.

The lower court, upon the state of facts as we have substantially stated them, instructed the jury to find for plaintiff in the action if they believed defendant, through its agents and servants, in charge of and operating the train of cars, by negligence, threw or evicted the plaintiff therefrom while it was in motion, and he was injured thereby, unless they should further believe plaintiff himself was guilty of negligence, which contributed to the injury to such an extent as that, but for his own negligence, the injuries would not have occurred. The jury was further instructed they might, in addition to compensatory damages, find punitive damages, in case they believed the plaintiff was injured by gross negligence of defendant, acting through any

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servant in charge of or operating its train. There is nothing in this case tending to show the brakeman, or other servant of appellant, was guilty of gross negligence, and consequently the jury was not authorized to, nor ought they to have been instructed they might, find punitive damages. Nor do we think the facts in this case authorized submission for consideration of the jury of any other question than is contained in the following instruction, asked for appellant, but refused: "The court instructs the jury that the plaintiff, Bernard, in attempting to ride upon defendant's freight train, was a trespasser; and if the jury believe, from the evidence, that, at the time the plaintiff was hurt, the brakeman used no more force than was necessary to prevent the plaintiff from getting on said train, then, in such event, the jury must find for defendant."

It is undoubtedly a first and well-established rule, heretofore recognized by this court, that, even though a person be a trespasser upon a railroad train, the employees of the company are not justified in forcibly expelling him therefrom while the train is in motion, or in using undue or brutal means for the expulsion. The reason for that rule is that the ordinary result of expelling a person from a train while in motion is bodily injury to him, danger of which is very little or very great according to the speed at which it is running. But in this case the trespasser had not actually boarded the train, clandestinely or otherwise, but was simply attempting to get upon one of the cars; and it is not unfair to assume that, if the motion of the train had so recently begun, or was so slow as that appellee could safely climb upon it, which he says he would have done if not prevented, the brakemen was not guilty of any degree of negligence in loosening his grasp on the iron rod, whereby he was compelled to desist, or even in shoving him off the hub of the car axle, unless in doing so, he used more force than was necessary, or did it in a brutal manner. For all the witnesses agree the train had moved but a short distance, and none of them put the rate of speed at more than four or five miles an

Notes.

hour when appellee ceased his effort to get upon the car, or was shoved off the places his feet rested upon. There is enough evidence to satisfactorily show that, immediately after the train began to move, for which appellee was evidently waiting, he commenced his effort to get upon the car, and, as it would have required a very short time for him to accomplish the feat, the train was manifestly moving slowly when the brakeman interfered; and, therefore, it would be an abuse of the term to say he was guilty of negligence, or any illegal act, in using necessary force to keep appellee off the train.

For the errors of the lower court in giving the instruction mentioned, and refusing the one asked by appellant, the judgment is reversed and case remanded for a new trial, and other proceedings consistent with this opinion.

NOTES.

Duty and Liability of Company to Trespassers upon its Cars.—See *McCann v. Sixth Ave. R. Co.*, 117 N. Y. 505; 43 Am. & Eng. R. Cas. 297; *Chicago, B. & Q. R. Co. v. Mehlsack*, 131 Ill. 61; 41 Am. & Eng. R. Cas. 60; *Missouri Pac. R. Co. v. Evans*, 71 Tex. 361; 37 Am. & Eng. R. Cas. 144; note 39 Id. 422; note 31 Id. 376; note 2 Id. 8; note 28 Id. 594.

Liability of Company Where Trespasser is Ejected.—Where the conductor of a railroad train, acting in the line of his duty, ejects from the platform of a car a person who has no right thereon, the company is liable if he has done it in a careless, negligent or reckless manner, but not if he maliciously ejects him therefrom. *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256; 1 Am. & Eng. R. Cas. 461.

A trespasser cannot legally be ejected from a train, when to do so would probably endanger his life or cause him to be injured. In spite of his wrongful conduct, the trespasser does not forfeit his life or subject himself to loss of his limbs without redress. *Thurman v. Louisville, etc., R. Co.* (Ky. 1896), 34 S. W. Rep. 893; 3 Am. & Eng. R. Cas., N. S., 652.

In *Carter v. Louisville, etc., R. Co.*, 98 Ind. 552; 8 Am. & Eng. R. Cas. 347, the company was held liable where the trespasser was kicked off the engine while in motion. So in *Kansas City, etc., R. Co. v. Kelly*, 36 Kan. 655; 34 Am. & Eng. R. Cas. 281, the company was held liable where a boy was commanded by a brakeman to jump from a moving train, and, complying with the command, was injured.

Same—Authority of Servants.—The servants of a railway com-

Notes.

pany, put in charge of a switching engine used to place cars, have implied authority from the company to remove trespassers from the engine; and if, in doing so, the trespasser be injured, not in consequence of negligence merely, but because of the reckless manner of doing it, evincing an indifference to consequences, the company is liable. *Carter v. Louisville. etc., R. Co.*, 98 Ind. 552; 22 Am. & Eng. R. Cas. 360.

A brakeman on a railroad train has no implied authority to eject trespassers from the cars. *International, etc., R. Co. v. Anderson*, 82 Tex. 516; 53 Am. & Eng. R. Cas. 60.

To charge a railroad company for the wilful wrong of an employee in forcing a boy from a freight train while in motion, whereby he is injured, it must appear that the act was in the course of the employee's business, and within the scope of his authority; the boy being a trespasser, not a passenger. *Bess v. Chesapeake & Ohio R. Co.*, 35 W. Va. 492. 53 Am. & Eng. R. Cas. 64.

Same—Unnecessary Violence.—It is the duty of railway employees to use no greater violence than is necessary in ejecting trespassers from trains, and where more than necessary force is used in ejecting a trespasser from a rapidly moving train so as to seriously injure him, the company is liable. *St. Louis S. W. R. Co. v. Huffman*, (Tex. Civ. App. 1895), 32 S. W. Rep. 30, 2 Am. & Eng. R. Cas., N. S., 157.

Same—Threats.—Plaintiff was sitting on a boxcar, which was standing in defendant's yard. An engine was attached to the car without his observing it, and the train was moved away. A person came to plaintiff and ordered him to leave the train, using violent and threatening language, in consequence of which plaintiff leaped from the car while it was in rapid motion, and was injured. The court instructed that if defendant's servant, within the scope of his employment, by peremptory order and threats, caused plaintiff to get off the car when it was dangerous to do so, defendant was liable. *Held correct. Gulf, etc., R. Co. v. Kirkbride*, 79 Tex. 457.

Same—Street Car.—In *Biddle v. Hestonville, etc., R. Co.*, 112 Pa. St. 551, 26 Am. & Eng. R. Cas. 208, a boy who lost his life in the accident, was upon the defendant company's car by sufferance of the conductor. The car was a "bobtail" one, and at the time of the injury was being driven by a boy, the driver being inside collecting fares. The boy driving the car invited a party of boys, of whom Biddle was one, to get on the car. The driver subsequently shoved one of the boys off the car and compelled the others to get off while it was in motion. Biddle in attempting to get off fell and was killed. The court held that the company was liable; that when a street railway company permits a boy to drive its car, and such driver invites other boys to get on, the conductor when he puts them off should stop the car for that purpose. It was his duty to put them off, but to compel them to jump off while the car was in motion rendered the company liable for any injury received owing to such improper conduct.

Same—Not Negligence Per Se.—Removing a trespasser from a train of cars when the train is moving very slowly, is not negligence or wantonness *per se*. *Southern Kansas R. Co. v. Sanford*, 45 Kan. 372, 47 Am. & Eng. R. Cas. 615.

COMMONWEALTH

v.

LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, Nov. 11, 1896.*)

Failure to Give Statutory Signals—Recovery of Fines.—A section of a state code provided that railroad companies, which violated the statutory provisions in reference to the giving of signals for railway crossings, cities, and towns, should be fined, and that such fine should be recovered by indictment, and a subsequent section of the code provided that all fines imposed by law might be recovered by civil procedure or by indictment. *Held*, that the fine imposed on railroads for failure to give signals at crossings, cities, and towns could be recovered by indictment only, and not by civil procedure.

APPEAL from Hardin county circuit court. *Affirmed.*

"Not to be officially reported."

Chelf & Vanmeter and *W. S. Taylor*, for the Commonwealth.

W. H. Marriott and *H. W. Bruce*, for appellee.

PAYNTER, J. Section 786 of Kentucky Statutes is as follows, to wit: "Every company shall provide each locomotive engine passing upon its road with a bell of ordinary size and steam whistle, and such bell shall be rung or whistle sounded, outside of incorporated cities and towns, at a distance of at least fifty rods from the place where the road crosses upon the same level any highway or crossing, at which a sign-board is required to be maintained, and such bell shall be rung or whistle sounded continuously or alternately until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require." Section 793 provides that, in case of violation of the provisions of the section quoted, in addition to subjecting itself to any damages that may be caused by such failure or vio-

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lation, the company is guilty of a misdemeanor, and shall be fined not less than \$100 or more than \$500, "to be recovered by indictment." The plaintiff is proceeding not by an indictment, but by an action brought to recover the penalty fixed by section 793. Section 11, Cr. Code, provides that a public offense of which the only punishment is a fine may be prosecuted by penal action in the name of the commonwealth of Kentucky. Section 1139, St. Ky., provides that all fines and forfeitures which may be imposed by law may be recovered by civil procedure or upon indictment of a grand jury. It is contended that the provisions of the Criminal Code and the statutes are applicable to this case, and that the remedy is either by civil procedure or by indictment. Of course, if the remedy was not prescribed by the statute under consideration, there could be no doubt that the position would be correct. At the time the statute was enacted to recover fines or forfeitures either of the two remedies could be pursued. We must presume that the legislature was acquainted with the existing law upon the subject. It, therefore, did know that, if no remedy was prescribed in the act, the existing law furnished either of two remedies. If the legislature had no purpose to prescribe the remedy for the violation of the statute, it would have said the fine was recoverable by civil procedure or by indictment, or would have been silent upon the question of remedy. Were we without rules for the interpretation of statutes, the foregoing view would be a satisfactory answer to the contention. It is said by Lawson on Rights, Remedies, and Practice (volume 7, § 3777) that: "When a statute has created a new right, and has also prescribed a remedy for the enforcement of that right, he who claims the right must pursue the statute remedy. So, when a summary remedy is given by statute, those who wish to avail themselves of it must be confined strictly to its provisions, and can take nothing by indictment. When a statute to attain a particular object prescribes the mode of proceeding to enforce it, that mode must be pursued." In *Russell v. Turnpike Road*

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Co., 13 Bush, 310, it is decided that when a statute has created a new right, and also prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the remedy. The same rule is enunciated in *Com. v. Jellico Coal Min. Co. (Ky.)* 30 S. W. Rep. 611. The statute gave a new right, and prescribed an indictment as the remedy for enforcing it; therefore, this action cannot be maintained. The judgment is affirmed.

WALKER *et al.*

v.

KINNARE.

(*Circuit Court of Appeals, Seventh Circuit, Oct. 5, 1896.*)

Reference to Master in Chancery—Scope of Report.—An order referring a cause to a master in chancery directed him to take proof upon the issues joined by the pleadings, and report such testimony to the court, with his conclusions thereon. *Held*, that such order required the master to report his conclusions of fact and of law, not the question of damages only.

Findings by Master—Exceptions—Burden of Proof.—The findings by a master upon a reference by consent of the parties are to be treated as presumptively correct, and the burden is cast upon the excepting parties to show error in them.

Accident at Crossing—Contributory Negligence—Gates.—One approaching a railway crossing, the bars of which were up and the flagman absent, attempted to cross before a train of whose approach he was aware, and was struck by the train and injured. *Held*, that he was guilty of such contributory negligence as to prevent a recovery of damages for his injuries, although the gates were not lowered and the flagman was absent.

Same.—The deceased, who was familiar with a railroad crossing at which there were a large number of tracks, approached it on a dark afternoon, when snow and rain were falling, and ran diagonally across the crossing in front of an approaching train in order to cross before it. On the fourth track, a little to the rear of the engine of the approaching train, and not in sight of the deceased when he approached the crossing, was an engine backing towards the crossing at a more rapid rate than the train. The headlight on the tender of the engine was lighted, and the bell was being rung. As the deceased attempted to cross the fourth track, he was struck and killed by the engine backing on that track. The engineer as soon as he saw him, applied the brake, and reversed the engine. *Held*, that the negligence of the deceased contributed to his death.

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APPEAL from the Circuit Court of the United States for the Northern District of Illinois. *Reversed.*

The Union Trust Company of New York, on the 23d day of December, 1893, filed its bill in the circuit court of the United States for the district of Kansas, against the Atchison, Topeka & Santa Fe Railroad Company, seeking foreclosure of a mortgage upon its railroad, and for the appointment of receivers, and on the same day receivers were appointed, pursuant to the prayer of the bill; the appellants being the survivors or successors of the appointees. The order of appointment directed the receivers, among other things, to pay "all just and legal liabilities incurred by the said company in the transportation of freight and passengers,

including damages for injuries to employees or other persons and to property, which have accrued, or upon which suit has been brought or was pending or judgment rendered, within twelve months last past. On December 26, 1893, an ancillary bill was filed in the circuit court of the United States for the Northern district of Illinois by the same complainant against the same defendant, and the same persons, by the last-named court, were appointed receivers of the property within that district. On the 16th day of December, 1893, and prior to the institution of either of such suits, Joseph P. McMullen came to his death while attempting to cross Main street, in the city of Chicago, in front of a moving engine, operated by the Atchison, Topeka & Santa Fe Railroad Company. On March 19, 1894, the appellee, as administrator of the estate of McMullen, filed his intervening petition in the ancillary suit mentioned, to recover damages, under the statute of the state of Illinois, on account of the death of McMullen. After answer and replication, the court below, on the 23d of July, 1894, upon motion of the solicitor for such administrator, and by consent of the solicitor for the receivers, ordered that the intervening petition, the answer of the receivers thereto, and the replication of the administrator "be, and the same are hereby, referred to E. B. Sherman, Esq., one

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of the masters in chancery of this court, to take proof on the issues joined in said petition, answer, and replication, and report the same to this court, with his conclusions thereon as to the amount of damages, if any, which the said administrator is entitled to recover under said issues."

On the 22d of December, 1894, the master reported the facts found by him and his conclusions, as follows:

"Facts: First. That from 31st street, in the city of Chicago, county of Cook, and state of Illinois, there runs northwesterly, to the south branch of the Chicago river, a street called 'Main street'; that south of and near to the said Chicago river there is a railroad crossing at about right angles with Main street, at which crossing there are at least Conclusions of Fact.

seven parallel tracks, some witnesses stating the number to be twelve; that on the 16th day of December, 1893, the two most northerly of said tracks were used by the Chicago & Alton Railroad Company, and the two tracks next on the south were used by the Illinois Central Railroad Company, and that south of its tracks were two other tracks used by the defendant railroad company, and there were gates both upon the north and the south side of said crossing, which were operated by a man in a tower situated at the northeast corner of said crossing and said Main street; that the part of the gate extending over the sidewalk west of Main street, and which, when lowered, extended west was broken so that when the gates were lowered, a space of at least five or six feet upon the outer part of the sidewalk west of Main street was left unprotected by said gate; and that said gate had been in that condition for a long time previous to December 16, 1893. Second. That Joseph P. McMullen, deceased, who was about fifty-eight years of age, and a millwright and machinist by trade, had been for about four months before said 16th day of December, 1893, employed upon a gas plant then being erected on Main street north of said crossing; that during this time he had lived south of thirty-first street, and in going

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to and from his home to his work, and returning, he had daily passed to and fro on Main street, and crossed said tracks at the Main street crossing ; that said McMullen was a strong and vigorous man, an expert at his business, and receiving from \$4 to \$4.50 per day. Third. That shortly after five o'clock in the afternoon of said 16th day of December, 1893, said McMullen, in going from his place of business to his home, approached the Main street crossing from the north, walking on the sidewalk west of Main street ; that said street was sixty-six feet in width, of which eight feet on each side was occupied by the sidewalk ; that the crossing and sidewalk across the tracks were planked in the same manner, so that there was no perceptible difference between the street and sidewalk so far as this crossing was concerned ; that, at the time said McMullen was so approaching said crossing, an Illinois Central freight train, coming from the west, nearly reached the crossing, and was within a block thereof ; that south of the said Illinois Central train, and separated from it by an intervening track, two engines of the defendant company, the one closely following the other, were backing down from the west, and, when near the Main street crossing, the defendant company's engine, in advance, was a little behind the engine of the Illinois Central train, and its speed a little greater ; that said McMullen, at the time when he reached the crossing, saw the approaching Illinois Central train, but could not see the defendant company's engines beyond and south of said Illinois Central train ; that neither said Illinois Central train nor said engines were, as they crossed Main street, running more than six miles an hour ; that upon the end of the tender of defendant company's locomotive, which first approached the crossing, there was a headlight ; that the bell on said locomotive had been ringing continuously for at least a mile west of said crossing, and was ringing when the engine approached, and while it was passing over the crossing ; that the gate on the north side of the crossing had not been lowered when McMullen passed it, nor was the

tower bell then ringing, but that the gate was lowered and the bell rung immediately thereafter, and before the Illinois Central train had passed over the crossing; that there was no flagman on duty at the time at the said crossing; that when said McMullen reached the crossing, upon the sidewalk west of Main street, the Illinois Central train was very close to the crossing; that said McMullen, in order to cross in front of said Illinois Central train, turned and ran to the southeast, diagonally across Main street and the Illinois Central tracks, and in front of its engine; that, continuing in the same general direction, he then passed the intervening track between the Illinois Central tracks, and that upon which defendant company's engines were passing, tender first, to the eastward, and, when about half the way across Main street, he ran in front of the tender of defendant company's engine, and was struck and killed by it, and his body carried to the eastward of Main street about 15 or 20 feet before the engine could be stopped; that the engineer of defendant company's engine, which struck and killed said McMullen, applied the brake, and reversed his engine, as soon as he saw him; that, at the time this accident happened, it was quite dark; that a drizzling rain and snow was falling.

"Conclusions of law: First. That the said McMullen, being familiar with said crossing, must be presumed to have known that the said tracks were used by different railroads, and that several trains or engines might approach said crossing either from the same or opposite directions at the same time; that he was put upon inquiry as to whether there were not other trains or engines upon the tracks south of the Illinois Central, and which he was not able to see, and against which, if there, he ought to be on his guard. Second. That the employees in charge of the defendant company's engine took every reasonable precaution, and were not guilty of negligence in the premises. Third. That neither the fact that the gates were not lowered sooner, nor the fact that part of the gate protruding over the sidewalk was broken, leaving

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a vacant space over a part of the sidewalk, contributed in any manner to the death of said McMullen, since he saw the approaching Illinois Central train, and was fully advised of its approach and of its nearness. That the failure of the defendant company and others using said crossing to keep a flagman stationed there, to give warning of the approach of trains and engines along the railroad tracks, did not contribute to the accident which resulted in the death of said McMullen. That the master understands the law to be that any failure of defendant railroad company to comply with a statutory requirement or a city ordinance, or any negligence on its part, which violation or negligence did not contribute to the injury received by said McMullen, does not create a liability against the defendant railroad company or its receivers. Fourth. The master therefore finds that the said administrator is not entitled to recover as against said defendant railroad company, or its receivers, in any sum whatsoever."

To this report the intervener (appellee here) filed exceptions, as follows:

"Exceptions to facts found: First. For that the master has found 'that said McMullen, at the time when he reached the crossing, saw the approaching Illinois Central train,' whereas he should have found that he first saw said train when he reached the Illinois Central track, and when he was in the midst of impending danger. Second. For that the master has found 'that neither the Illinois Central train nor said engines were, as they crossed Main street, running more than six miles per hour,' whereas the master should have found that trains were going at least fifteen miles per hour. Third. For that the master has refused to find that the ordinance of Chicago in force on the 16th day of December, 1893, required a flagman at said crossing. (The fact is, the ordinance was produced and quoted, but master claimed it was not within his province to make any finding on 'question of ordinance or statute.') Fourth. For that the master has refused to find that the said railroad company did not at the time of said

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accident render such protection to the public by substituting a towerman in lieu of a flagman, as is contemplated by said ordinances. Fifth. For that the master has refused to find from the evidence that engineer of said Santa Fe locomotive saw McMullen, and reversed his engine just as he reached the west side of Main street.

“ Exceptions to conclusions of law : First. That as to the first finding of law, ‘ that he was put upon inquiry as to whether there were or were not other trains or engines upon the tracks south of the Illinois Central, and which he was not able to see, and against which, if there, he ought to be on his guard,’ intervener insists is not a proper conclusion of law or fact. The master should have found that, by reason of the gates being up and the absence of a flagman, McMullen was invited to cross said tracks ; that, by reason of the darkness then prevailing, he did not see said Illinois Central train or the Santa Fe engine until he was in imminent peril of his life. Under these circumstances, the intervener should have recovered for all injury or damages sustained. Second. That as to said second finding of law, ‘ that the employees in charge of defendant’s engine took every reasonable precaution, the master erred. He should have found that they were going at an unlawful rate of speed, especially in attempting to pass the Illinois Central freight train at the crossing. Third. That as to the third finding of law the master erred in stating that the failure of the company to observe the necessary signal, and give the required warnings, did not contribute to the death of McMullen, since the latter saw and understood the nearness of the Illinois Central train, and, not so contributing to the said death, the said company is not liable. The master clearly erred, and should have found that McMullen was entitled to all the protection in the way of signals and notices required by statute or ordinance. That, in the absence of these, the burden of proof is on the Santa Fe Company to show that notwithstanding, if the required signals had been given by them, the said McMullen

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len would, nevertheless, have been killed. This the said company has not shown. Fourth. That as to the fourth finding of law, that the said administrator is not entitled to recover as against said defendant railroad company, or its receivers, in any sum whatsoever, the master erred. He should have found that the said defendants were guilty of negligence *per se*, and that the said defendant company was guilty of gross carelessness and negligence. That said deceased used ordinary care, and that his administrator should recover damages," etc.

On the 26th of June, 1895, the court below entered an order sustaining the exceptions to the master's report, and found that the intervening petitioner was entitled to a decree for damages, and re-referred the cause to the master, to ascertain the amount of damages, and report to the court. In pursuance of that interlocutory order or decree, the master reported damages in the sum of \$4,871.69, to which report exceptions were filed by the appellants here, which exceptions were overruled by the court below, which court, on the 2d day of December, 1895, entered decree in favor of the intervener for the damages reported, and directed the receivers to pay such amount out of funds in their hands arising from the administration of the estate of the Atchinson, Topeka & Santa Fe Railroad Company, from which decree, upon proper assignments of error, the receivers appeal to this court.

Robert Dunlop, for appellants.

Jesse B. Barton and *Oscar R. Ziff*, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after this statement of the case, delivered the opinion of the court.

An objection, preliminary to the consideration of the merits of the cause, is raised by the appellee, to the ef-

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fect that the original order of reference to the master did not require him to report any conclusions of his own, either of fact or of law, upon any other subject than that of the amount of damages. This objection seems to be for the first time raised in this court, and cannot be sustained. Upon the face of the order, we think it clear that it was the design of the court to refer the whole case to the master. It should be read as though it required the master to report the proofs to the court, with his conclusions thereon, and as to the amount of damages, if any, which the administrator was entitled to recover under the issue. Ordinarily, in equity, references are not made or evidence taken to ascertain the damages to which a party is entitled, until it has first been determined that he is entitled to recover at all. Here the master was directed to take proof upon the issues joined by the pleadings, and report such testimony to the court, with his conclusions thereon. If the word "conclusions" referred simply to the amount of damages, the word would have been expressed in the singular, and not in the plural. This construction of the order was the one adopted and acted upon by both parties, and by the court below. The record discloses that the appellee filed objections before the master to the proposed report, insisting that, upon the merits of the case, he should have made other and different findings of fact, and other and different findings of law, and requested the master to report certain findings on questions of fact upon which he had made no findings at all; and before the court he insisted that the master erred in his findings of fact, and in his refusal to find upon the questions as requested. There was no objection then taken that the order did not authorize a finding by the master upon the merits of the case. If the order could be construed as is now contended, the court should have stricken out the findings by the master as unauthorized; but the court ordered that the exceptions be sustained. This action by the court is a clear recognition that the order it had made required the mas-

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ter to report his conclusions of fact and of law upon the merits of the case.

The findings by the master upon a reference by consent of the parties are to be treated as presumptively correct, and the burden is cast upon the excepting parties to show error in them. The report is not to be disregarded upon any light ground; but as MR. JUSTICE FIELD observes in *Kimberly v. Arms*, 129 U. S. 512, the findings of the master, like those of an independent tribunal, "are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." And he further observes that the findings "should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made."

Findings by Master
— Exceptions — Bur-
den of Proof.

A careful review of the evidence compels us to the conclusion that the findings of fact and of law by the master were correct, and should have been sustained. In reaching this conclusion, we assume as matter of fact that the railroad company was negligent in not seasonably causing the gates to be lowered at the crossing upon the approach of the Illinois Central train and of the engines of the Santa Fe road. We also assume that, when

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ligence.

McMullen approached this crossing, the gates were up, and that no flagman was stationed there, to give warning of approaching engines or cars or of impending danger, and that this was an invitation to him to go upon the crossing, and an assurance to him that no danger was impending. All this, however, did not absolve McMullen from the duty of care proportioned to his surroundings and situation. The violation of duty by the company is not actionable, unless it be a proximate and promoting cause of the injury. The lowering of the bars, and the presence of a flagman properly discharg-

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ing his duty, are to give notice of the approach of a train; but if McMullen had such notice otherwise and in season to avoid an injury, if he was fully apprised of what the flagman or the lowering of the gates would have told him, if he knew that the train was at hand and approaching so nearly to him that he could not safely cross the track in front of it, he was, in his attempt to cross in front of the approaching train, guilty of negligence, which contributed to the injury, and which would prevent a recovery of damages against the company. See *Railroad Co. v. Fears*, 53 Ill. 115; *Railroad Co. v. Bell*, 70 Ill. 102; *Blount v. Railway Co.*, 22 U. S. App. 129.

The facts touching the conduct of the deceased lie within narrow compass. At this crossing there were from seven to ten parallel tracks. The two most northerly of the tracks were used by the Chicago & Alton Railroad Company. The two tracks next to the south were used by the Illinois Central Railroad Company. The two tracks next south were used by the Atchison, Topeka & Santa Fe Railroad Company. McMullen was 58 years of age, a millwright and machinist by trade, and for 4 months prior to this accident had been familiar with this crossing, passing it twice every day. He was a strong and vigorous man, an expert in his business, and in full possession of all his faculties. The accident occurred at 5 o'clock in the afternoon of the 16th of December. McMullen was returning from his place of business to his home. The street was 66 feet in width, 8 feet on either side being occupied by the sidewalk, the whole crossing being planked so that there was no perceptible difference between the street and the sidewalk. An Illinois Central freight train was coming from the west, and had nearly reached the crossing when McMullen came upon it. On the south track of the Santa Fe road two engines were backing down from the west, one closely following the other. At a point near to Main street, the engine of the Santa Fe road, which was in advance, was a little behind the engine of the

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Illinois Central train, and its speed was a little greater ; neither engine nor train moving at a greater speed than six miles an hour. Upon the end of the tender of the engine first approaching the crossing, there was a head-light, which was lighted, and the bell of the engine had been ringing continuously from the time the engine was a mile west of the crossing, when it approached, and while it was passing over the crossing. The gate was lowered and the tower bell rung immediately after McMullen passed upon the crossing, and before the Illinois Central train had reached it. McMullen, as the master finds, in order to cross in front of the Illinois Central train, turned and ran to the southeast diagonally across Main street and the Illinois Central tracks, and in front of the coming train. After passing the Illinois Central tracks, he continued in the same general direction, crossing the north track of the Atchison, Topeka and Sante Fe Railroad Company, and undertook to cross the track upon which these engines were coming, and was struck by the coming engine and killed. The engineer, so soon as he saw McMullen, applied the brake, and reversed his engine. It was quite dark at the time of the accident, a drizzling rain and snow falling, We cannot regard the conduct of McMullen, under the circumstances, otherwise than as reckless and inexcusable. He knew that the Illinois Central train was near to that crossing. This is made manifest by the direction which he took to pass in front of it. He was in a dangerous place, with which he was familiar. He knew that trains and engines were constantly passing and repassing there. His duty was that of active watchfulness. He sought to avoid a minute of delay by crossing the track, upon a run, in front of the coming train. In this he succeeded ; but the duty was still resting upon him to watch for trains or engines upon the six or eight tracks south of the Illinois Central track. He should have looked before putting foot upon the tracks of the Sante Fe road. If he had stopped upon the north track of that company's road, and had then looked, he would have seen the ap-

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proaching engine almost directly in front of him. He could readily have stopped upon the north track of the Santa Fe road, and have avoided the danger. As before, with respect to the Illinois Central train, so now, with respect to the engine of the Santa Fe Company, he chose to take the risk of running across the track in advance of the engine. He either did not look to see, or, seeing, took the risk of crossing in advance of the engine. In either case his conduct was negligent and efficient to cause his death.

We cannot sustain the contention of the appellee that McMullen was lured into a position of sudden danger by the negligence of the company, and that, therefore, he was not chargeable with negligence, but with mere error of judgment in an emergency in which he was placed by the wrong of another. He was in no situation of danger when he saw the Illinois Central train approaching. He was in a safe position. All that he had to do was to stand still until the train had passed. He preferred to take the chance of crossing this network of tracks in front of a coming train. To uphold such conduct would absolve the public from all duty of care at railway crossings, and give sanction to recklessness.

The order of the court of primary administration directs the payment of such claims as the present one as a preferred claim. The record does not give the order appointing these receivers made in the court below. We assume, therefore, for this purpose, that, being entered in an ancillary suit, it was couched in the same language as the order of the court of primary jurisdiction. The conclusion which we have reached upon the merits renders it unnecessary to give expression to any opinion upon the question whether such claims as the present one can in any just sense be preferred to the mortgage debt of a railroad company. We comment upon the terms of the order merely to observe that this court must not be deemed, *sub silentio*, to approve the terms of the order. We reserve our opinion upon that

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matter until the question shall properly be brought to our attention.

The judgment will be reversed, and the cause remanded, with directions to the court below to enter a decree in favor of the appellants, overruling the exceptions to the master's report upon the facts, and dismissing the intervening petition of the appellee upon the merits.

CLARE

v.

NEW YORK & N. E. R. Co.

(Supreme Judicial Court of Massachusetts, Oct. 22, 1896.)

Injury to Employee—Defective Machinery.—In an action to recover for injuries received by an employee of a railway company resulting in his death, and alleged to have been caused by a defect in the machinery of a handcar, the only evidence connecting the defendant with the employee's injuries was that the fall which caused the injuries might have been caused by the slipping of the gear of the car and that the box over the gear would rise sufficiently when a hard grade was being climbed to allow the gear to slip, but it was not established that the fall was caused by the slipping of the gear. *Held*, that the court did not err in instructing a verdict for the defendant.

EXCEPTIONS from Worcester county superior court.
Exceptions overruled.

Francis M. Morrison, William A. Gile, and Charles T. Tutman, for plaintiff.

Frank P. Goulding and Frank L. Dean, for defendant.

HOLMES, J. This is an action for personal injuries to the plaintiff's intestate, one Morrissey, which resulted in his death, and which are alleged to have been caused by a defect in the machinery of a hand car. At the trial the presiding judge directed a verdict for the defendant, and the case is here on exceptions. The

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only eyewitness of the accident was a fellow workman, who was turning the crank of the hand car on the left, while Morrissey was turning it on the right. According to his statement, he himself was pulling on the crank, and Morrissey was pushing, when Morrissey suddenly went out of the car over the crank, head first. The witness further stated that he did not know what caused the accident, that nothing happened to his side of the crank, so far as he noticed ; and that it turned all right, smooth, without any trouble. We assume that there was evidence that the box, when pulled on as it would be in climbing a hard grade, would rise enough to allow the gears to slip. But there was no other evidence connecting the defendant with Morrissey's fall.

We are of the opinion that the judge was right in taking the case from the jury on the ground that it would be mere conjecture, at the best, if the injury should be attributed to slipping of the gears. Such a case is not to be left to the jury unless the court can say that the jury are warranted, from their experience as men of the world, in saying that the accident is more likely to happen from the alleged defect than from other possible causes. If, on the other hand, the court can see that common experience does not warrant such a judgment, it is its duty to direct a verdict. In this case it seems to us that it cannot be said that the fall was more likely to happen from the slipping of a gear than from some one of the other causes for which the defendant was not responsible. Morrissey's clothes may have caught on the crank, as in *Carey v. Railroad*, 158 Mass. 228, or he may have lost his balance by too violent a motion, or he may have been seized with vertigo. The cause relied on has to be set against the total of other possible causes. We cannot admit that common experience may have furnished the jury with data as to the relative frequency of the different chances sufficient to enable them to pronounce a rational determination. It is a practical question with reference to the particular facts of the case, but it is one of those practical questions upon which the court has to exercise its

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judgment in the first place before submitting it to any one else. See *Doyle v. Railroad*, 145 Mass. 386-388. The plaintiff's evidence, which is all that there is in the case concerning the precise mode of the accident, distinctly negatives the slipping of the gear, since one handle of the crank could not have moved irregularly without the other doing the same; and, although theoretically the jury might honestly have disbelieved so much of this evidence as was unfavorable to the plaintiff, the testimony brings out more forcibly the wholly conjectural character of the plaintiff's suggestion of the cause.

Exceptions overruled.

SMITH

v.

CHICAGO, R. I. & P. Ry. Co.

(*Supreme Court of Iowa, Oct. 27, 1896.*)

Injury to Employee—Negligence.—In coupling cars, a switchman of a railway company, after the signal had been given to back some cars slowly against a standing car, stepped before the moving cars, and walked before them until they came to the standing car, when he made the coupling; and starting to step from between the cars, he fell, or was thrown down, and the car ran over one of his legs inflicting injuries from which he died. After he fell, the cars moved only three feet. *Held*, that there was not sufficient evidence to establish negligence on the part of the railway company.

APPEAL from Polk county district court. *Affirmed.*

L. Kinkead and *W. C. Kinkead*, for appellant.
Cummins & Wright, for appellee.

GIVEN, J. 1. The question involved in defendant's motion for a verdict is whether, under the evidence, the court erred in not submitting the case to the jury. There being a dispute as to the correctness of the ab-

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tracts, we have been required to examine the transcript of the evidence on file, from which we find the following to be the material facts in the case: The deceased was an experienced railroad man, having been employed in various positions in the operation of engines and cars for many years. At the time of this accident he was in the employment of the defendant as one of a switching crew working in defendant's yards at Des Moines. The crew consisted of an engineer and fireman in charge of the engine; two switchmen, of which deceased was one; and a foreman in immediate charge of the work of the crew. It was the duty of this foreman and crew to move cars about the yard to such points as directed by the yard master. Near 6 o'clock on the evening of November 24, 1892, said crew was engaged in putting some loaded coal cars in place to be unloaded on a side track running east and west the grade of which was practically level. It being in the dusk of the evening, the foreman and deceased each carried a lighted lantern. The engine, with four cars attached west of it, was backed in from the east onto said side track, the purpose being to back up to a loaded car of coal standing on said track, and to push it and the other cars further west to certain coal sheds. The west of the moving cars, and also the standing car, were what is known as foreign or Pennsylvania cars, each having the double deadwood with a drawbar coupling between,—a fact that was plainly obvious, and known to the foreman and to the deceased. The foreman and the deceased were on the ground, north of said side track, and walking west with the moving cars, near the west end thereof. When within a car's length of the standing car, a signal to stop was given, which was obeyed, and the engine and cars brought to a standstill. Thereupon the foreman and the deceased each gave a signal to back up slowly, which was obeyed, and the engine and four cars were moved west to the standing car at "not to exceed two miles an hour." After the signal to back up slowly was given, the deceased stepped in onto the track at the west end of the

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moving cars, for the purpose of coupling them to the standing car, and continued to walk west with the moving car until the standing car was reached, whereupon he made the coupling, and then started to go out north from between the cars. From some cause that does not appear he fell or was thrown down so that one or more of the car wheels ran over one of his legs and injured him so that he died of the injury the next day. There is nothing whatever to show that his fall was caused by any fault upon the part of his co-employees in the movement of the train. The foreman was near by, watching the movements of the deceased, and gave a signal to stop when the coupling was made, which signal was obeyed so that the cars only moved about three feet after the deceased fell. It is alleged and argued that the men in charge of the engine were negligent in not stopping the train the moment they felt it strike the standing car. The evidence shows that they did so, and that the train only moved about three feet. It is immaterial whether this stop was made in obedience to the foreman's stop signal or because of striking the standing car. The cars were stopped, and, therefore, there was no negligence in this respect. Appellant's counsel contend, and correctly so, that this motion for verdict is in the nature of a demurrer to the evidence, and that in considering it the court must accept as established whatever the evidence tends to prove. We have examined the evidence with care, and, applying this rule, fail to discover in it anything that tends to establish negligence upon the part of the defendant or its employees. We think that but one conclusion can be drawn from it, and that is that the accident occurred because deceased made a misstep that caused him to fall, when coming from between the cars. We think there was no error in sustaining defendant's motion for a verdict.

2. Appellant complains of certain rulings and statements of the court in taking the testimony. Most of these complaints relate to testimony as to the meaning of a "slow signal," and whether it was the duty of the

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engineer to stop the train without signal on striking the standing car. The meaning of "a slow signal" was fully explained by several witnesses. Whether it was the duty of the engineer to stop the train before feeling the impact with the standing car is immaterial under this evidence, as it appears without conflict that he did stop the train immediately upon striking the standing car, either because of that fact or in obedience to the stop signal from the foreman. He did stop the train; therefore, it is immaterial as to whether, under the custom, he might have continued the movement. It is complained that the court assumed that the track was level. The evidence shows that it was so nearly level as that the grade in no wise affected the movement or stopping of the cars nor contributed to the accident. We have examined these several complaints with care, and find no error in the rulings or statements of the court in taking the testimony that was prejudicial to the appellant. Our conclusion upon the record before us is that the judgment of the district court should be affirmed.

LUMLEY

v.

WABASH R. CO.

(Circuit Court of Appeals, Sixth Circuit, June 22, 1896.)

Ancillary Suit—Jurisdiction.—A suit in equity, filed by direction of a court, ancillary to a legal action pending before such court, is clearly within the jurisdiction of the court.

Cancellation of Release of Damages.*—One injured in a railway collision submitted himself to the chief surgeon of the railway company for examination as to his injuries. On the representation of the surgeon as to their extent, he signed a release of any claim for damages as to the injuries which he suffered, and received pay therefor. Subsequently, injuries far more serious than those reported by the surgeon developed. *Held*, that it was the surgeon's

*See note at end of case.

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duty to have made known to the plaintiff such injuries, if he knew of them or suspected them, knowing that the sum given for the release would be fixed upon the basis of his opinion as to the extent and character of the plaintiff's injuries and the probable loss of time by the plaintiff; and that if the surgeon failed to report such injuries, the release would not stand as an impediment to the recovery of just compensation by the plaintiff for his injuries.

Release of Damages as to Specified Injuries—Effect as to Unspecified Injuries.—If both parties supposed that the plaintiff had received certain injuries, the extent and character of which were considered and discussed with reference to the probable loss of time by the plaintiff in consequence thereof, and a release specifically mentioning the particular injuries known and considered as the basis of settlement is signed by the plaintiff, general language following will be held not to include a particular injury then unknown to both parties, and of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed.

Partial Settlement—Recovery of Further Damages.—The rule of procedure that damages resulting from one and the same cause of action must be sued for and recovered once for all, does not apply where the parties agree upon a settlement for a part of the damages and a release is given therefor, so as to bar a right of action to recover damages for injuries not covered by the release.

Same—Tender of Damages Received.—Where a person injured in a railway collision had given a release of claim for damages for a part of his injuries, and received damages therefor, it was not necessary that he should pay back such money when he sought to recover for the other part of his injuries.

APPEAL from the Circuit Court of the United States for the Southern Division of the Eastern District of Michigan. *Reversed.*

Appellant's bill was dismissed upon demurrer for want of equity. It contained, in substance, the following statement: That the complainant was a passenger on the Wabash Railway, in charge of a shipment of horses owned by his employer, which were being transported from Ridgetown, in the province of Ontario, to Danville, in Illinois; that while the car in which said horses were was in the yards of the Wabash Railway Company at Detroit, Mich., a collision occurred between said car and a locomotive operated by the servants of the Wabash Railway Company, whereby complainant, who was in the car in discharge of his duties, sustained great and permanent bodily injuries; that this collision occurred on the night of October 3, 1890, and was wholly due to the fault and negligence of the servants of the defendant company; that,

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notwithstanding his injuries, he pursued his journey ; that on the following morning he was attended by a surgeon in the employ of the company, who placed his arms in splints ; that on the second morning his car reached its destination,—Danville, Ill.,—where he was taken to the office of the chief surgeon of the said company ; that it was found that complainant was suffering from two injuries,—a superficial contusion on the forehead and a fracture of the right arm between the elbow and wrist ; that complaint was made of pain in the right shoulder, but that said surgeon made no examination of the parts, assuring complainant that the pain he noticed was due to the broken arm, and was wholly "sympathetic" ; that upon a second visit to the office of this surgeon he met one Austin, who represented himself as anxious to settle with complainant for "the fracture of his arm and the contusion" above described ; that complainant was asked what his regular wages were ; that he replied that he was a carpenter, and earned eight dollars per week ; that Austin then asked the said surgeon how long it would be before complainant would be well and able to resume his work ; that the surgeon answered "that the contusion was trivial, and that the fracture would be entirely well in about eight weeks" ; that said surgeon more than once assured your orator that he would be able to resume his daily occupation "in not to exceed eight weeks at the very outside" ; that Austin calculated what orator would earn in eight weeks at \$64 ; that upon a suggestion that his arm might require a readjustment of the splints on his arrival at home, Austin said that he would pay the difference between \$65 and \$75 "for that purpose," and would pay orator \$75 on account of said injuries ; that this was accepted ; that it was never claimed or pretended that the company was not liable for the injuries sustained in said collision ; that a release was drawn up by said Austin, "which he pretended to read, * * * but that he read same with great rapidity ; whether he read all of it your orator does not know, but he charges that he did not" ; "that all

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your orator understood him to read was with regard to the receipt of seventy-five dollars, and the expression, 'fracture of the arm';" that no copy of this release was given orator, and that he never afterwards saw it until filed in court in a suit to be mentioned hereafter; that in May or June, 1894, on request of orator's counsel, a copy of same was furnished complainant, when, and for the first time, he became aware that it contained terms which he never understood as the subject of settlement or consideration. The release aforesaid was in these words: "Whereas, on the third day of October, A. D. 1890, I, Ephraim Lumley, of Ridgetown, Ontario, Canada, was a passenger of the Wabash Railroad Company, and as such passenger was engaged in the discharge of my duty in caring for horses loaded in car, said car standing on tracks in R. R. Yard, Detroit, Mich., at time said car, wherein I was, was run against and upon by a locomotive, giving car heavy shock, whereby I was injured, on the Third district, E. Division, of said railroad; and whereas, I, the said Ephraim Lumley, received certain injuries, to wit, severe contused and lacerated wound on forehead, right side, fracture of right arm between wrist and elbow, and various injuries and contusions, both internally and externally, in and on various parts of my body; and whereas, I, the said Ephraim Lumley, believe that my injuries are the direct result of the negligence of said railroad company, its officers, agents, and employees; and whereas, the said railroad company denies any and all negligence on the part of itself, its officers, agents, and employees, and denies any and all liability for damages for the injuries so as aforesaid by me sustained, but by reason of an offer of compromise, made by me, the said Ephraim Lumley, for the purpose of avoiding litigation, to receive and accept the sum of seventy-five dollars in full accord and satisfaction for all claims for damages which I may or might have, either at common law or by virtue of any legislative enactment of the state of Michigan, for the injuries aforesaid, have paid to me the said sum of seventy-five dollars: Now, there-

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fore, in consideration of the premises, and of the payment to me of the aforesaid sum of seventy-five dollars, the receipt whereof I do hereby acknowledge, remise, quitclaim, and forever discharge the said the Wabash Railroad Company, its leased and operated lines, of and from all actions, suits, claims, reckonings, and demands for, on account of, or arising from injuries so as aforesaid received, and any, every, and all results hereafter flowing therefrom. Witness my hand and seal this sixth day of October, A. D. 1890."

The bill then charges that, so far as said release undertakes or purports to release or discharge said company from liability for any injury except the head contusion and fracture of the arm, and so far as it recites that there was a controversy as to the liability of the company "the same is false and fraudulent, and was imposed upon your orator fraudulently, and without proper reading upon the part of said claim agent; and that orator never intended to execute any such paper, and no such agreement was ever made between the parties." The bill then states in a detailed way that the shoulder trouble increased, and that subsequently it was discovered that the supposed "sympathetic pain" in the shoulder and adjacent parts had an independent origin, the shoulder having been dislocated and fractured; that from these unknown injuries to the shoulder, complainant was for a long time confined and suffered much distress, and that from those injuries he is and has been permanently disabled, and is unable to support himself through his avocation; that it was never intended to release said company from liability for any injuries other than those known and discussed at the time; that he trusted entirely to the statement and representations of the said chief surgeon as to the character and extent of his injuries; that he did not read the release prepared for him, and relied entirely upon the good faith and honesty of the servants of the company who prepared it. It charges that if said surgeon knew the fact that he had sustained serious and independent injuries to his shoulder, his representations

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that the pain in his shoulder was purely sympathetic was an actual fraud ; that, on the other hand, if he was ignorant, the language of the release is too broad, in that it purports to cover "various injuries and contusions, both internally and externally, in and on various parts of my body"; that the words quoted were inserted fraudulently, and were no part of the subject-matter of the settlement, and were inserted without the knowledge and intent of the complainant. The bill alleges that in May or June, 1894, a copy of said release was obtained from said company, until which time he was ignorant of its terms ; that under advice of counsel he at once tendered a return of the \$75, with interest, which was rejected ; that in July, 1894, an action was brought in a state court to recover damages for the injuries so sustained ; that the defendant company "duly moved" that suit into the circuit court of the United States for the Eastern district of Michigan ; that in January, 1895, that case came on for trial ; that after the conclusion of the evidence and argument the court made an order allowing plaintiff to withdraw a juror upon condition that he would within 30 days file a bill on the equity side of that court for the purpose of avoiding the release aforesaid ; that in compliance with that order this bill is filed, and the money received under said release deposited in the registry of the court. By way of excusing the delay in tendering back said money and in filing a bill to cancel or limit said release, the bill states that complainant, owing to his poverty, was unable sooner either to pay back said money or bring suit ; that he did not know that the release he had signed embraced this injury until he obtained a copy in May or June, 1894 ; that he had a good cause of action for the injury to his said shoulder and parts adjacent, for an amount exceeding \$2,000 ; that the defendant had no legal defense against such action, and that it has fraudulently set up said release as a defense to said action. The bill prays the cancellation of said release as having been obtained through fraud, or that the court will enjoin defendant from pleading said re-

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lease as a bar to an action for said injuries to complainant's right shoulder and the adjoining parts, or limit the release so that no right of action will be released save that for the contusion to the head and the fractured arm.

Alfred Lucking, for appellant.

Alfred Russell, for appellee.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

After making the foregoing statement, the opinion was delivered by LURTON, Circuit Judge.

The first ground of demurrer questions the sufficiency of the averments of the bill touching the jurisdiction of the court. The averment is that the complainant is "a resident of Ontario and a citizen of the dominion of Canada." It is said that the averment should have been that he was "an alien, and a subject of the queen of Great Britain and Ireland," and that the court is not authorized to infer that he is an alien from the averment of the bill. For this counsel cite *Anderson v. Watt*, 138 U. S. 694, 702, and *Stuart v. City of Easton*, 156 U. S. 46. Without passing upon this question, we think the jurisdiction of the court is clearly to be supported upon the ground that this suit is ancillary to the action at law. Whether the circuit court had jurisdiction in the legal action now pending is not a question which we can review in this dependent and collateral suit. This bill was filed in aid of the legal action, and by direction of the court. We need look no further than the allegations of the bill, which show its collateral character. *Compton v. Railroad Co.*, 31 U. S. App. 529.

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The remaining grounds of demurrer may be considered together. Collectively, they may be said to challenge the sufficiency of the facts stated to justify a court of equity in preventing the respondent from setting up the release obtained from the complainant as an impediment to the recovery at law of compensation for

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the injuries he has sustained. It cannot be denied that the terms of the release in question are sufficiently comprehensive to prevent a recovery for any of the injuries which may have been sustained by the complainant as a consequence of the negligent collision of which he complains. The consideration stated in the release is both particular and general. The recital is that Lumley received certain injuries, to-wit, "severe contused and lacerated wound on the forehead, right side, fracture of right arm between wrist and elbow, and various injuries and contusions, both internally and externally, in and on various parts of my body." The release is from "all actions, suits, claims, reckonings, and demands for or on account of or arising from injuries so as aforesaid received, and any, every, and all results hereafter flowing therefrom." The gravamen of the bill is that complainant received an injury to his shoulder, by breaking or dislocation, which has permanently disabled him, and reduced him to a state of helplessness; that this injury is not a consequence or result of either the contused wound on his head or the fracture of his right arm, but was an independent injury, not mentioned or described in the release except as it may be included under the general term "various injuries," "internally and externally in and on various parts of my body." The explicit averment of this bill is that this serious injury was unknown to complainant at the time he gave the release in question, and was not considered as an element for compensation, and, being unknown, his right of action was not intentionally released or discharged. He, therefore, asks that the release be altogether set aside, or confined to the subjects discussed, known, and considered when the release was granted. To give emphasis to this latter equitable contention, the bill states that attention was called to the fact that his shoulder gave him pain, but that no physical examination was made to ascertain the cause; that when he mentioned this fact, the chief surgeon of the defendant, who was giving him surgical assistance, assured him that the pain was "purely sympathetic,"

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and was attributable to his fractured arm. Thus the matter was dismissed, and a release executed upon the representation of this surgical servant of the defendant that the known and considered injuries would be well within less than eight weeks. It has now turned out that this unknown and unsuspected injury was the principal injury sustained, and has resulted in a permanent and serious bodily disability. If the terms of the release are so broad and comprehensive as to embrace a distinct and independent injury, not known or considered by the parties to the release, it will be most inequitable that it should stand as an impediment to the recovery of just compensation therefor. There are two distinct grounds upon which relief may be rested in such a case :

First. If the existence of this injury was known or suspected by the surgeon of the defendant, it was his duty, under the facts stated in this bill, to have informed Lumley of the trouble. To say to him that the pain of which he complained was sympathetic, and was caused by the fracture below his elbow, was a positive misrepresentation of the truth, and an operative fraud. To say that Lumley ought not to have trusted or relied upon his opinions or representations, knowing that he was in the service of the company against whom he had a claim, is no answer. On the facts stated he knew that a release was being bargained for upon the basis of his opinion as to the extent and character of the injuries complainant had received, and the probable time he would lose from his occupation by reason thereof. He was under strong obligation to give his honest opinion upon a matter of professional knowledge, upon which he had every reason to know this ignorant man was implicitly relying.

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Second. But if this surgeon honestly supposed the shoulder pain to be sympathetic, either because his examination had been superficial, or because he had made none, we would then have a case where a release is comprehensive enough to cover a matter or claim unknown to both parties, and was therefore not the sub-

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ject of consideration. Equity relieves from mistakes as well as frauds. The case is not one where it was sought to compromise and settle a general claim for all the injuries resulting from a particular accident, known and unknown. If one agrees that he will receive a given amount in satisfaction and settlement of his damages sustained through a particular accident, it is not essential that every possible consequence of the tort shall be mentioned, considered, or enumerated. The subsequent discovery by one giving such a release that he was worse hurt than he had supposed, would not, in and of itself, be ground for setting aside the settlement or limiting the release. We put our judgment upon the facts stated in this bill, to wit, that both parties supposed complainant had received certain injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed. This jurisdiction is well known, and has frequently been applied in cases of release affecting property rights, both in courts of law and equity.

Release of Damages
as to Specified
Injuries.

In *Cholmondeley v. Clinton*, 2 Meriv. 173-352, Sir William Grant, master of the rolls, mentions the case of *Farewell v. Coker*, decided by Lord King, where a release was executed so general in its terms as to pass a reversion in fee. A bill being filed to set aside this release upon the ground that it was meant only for a particular purpose, Lord King directed an issue to try—First, whether, at the time of the execution of the release, she knew or was apprised of her title under the will to the reversion; secondly, whether she intended by the release to pass that reversion. This decree was affirmed by the house of lords.

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In *Ramsden v. Hylton*, 2 Ves. 304-309, Lord Hardwicke, in considering whether or not a certain demand was within the terms of a release, said :

"First. It is certain that if a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited, which was under the contemplation of the parties and intended to be released. The particular point in consideration was not relative to this estate, but what they could have against him as representative to his mother, brother, or father's personal estate, to which the words are particularly confined. But there is no occasion to rely on the law for this, for it is clear that it would not in a court of equity, it being admitted on all hands, and it must be so taken, that this settlement was unknown to all the parties. Nor did the daughters know of this contingent provision, beside which they had no other provision out of this estate ; and all they could be entitled to must arise out of the personal estate of their father or other relations. It is impossible, then, to imply within the general release that which neither party could have under consideration, and which it is admitted neither side knew of ; and, as this release cannot have its effect to bar this demand, so it cannot be set up against them in a court of equity."

In *Lyall v. Edwards*, 6 H. & N. 336, this principle was applied in the court of exchequer. A release was pleaded to an action for conversion of certain goods. To this a release was pleaded in terms broad enough to cover the claim involved. The replication was that at the time of the release the plaintiff did not know that the defendants had committed the grievance in the declaration mentioned, or that plaintiff had any claim or cause of action against the defendants in respect of the goods in the declaration mentioned. Pollock, C. B., said :

"The replication was good. * * * It is a principle long sanctioned in courts of equity that a release

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cannot apply, or be intended to apply, to circumstances of which a party had no knowledge at the time he executed it, and that, if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief."

See, also, *London & S. W. R. Co. v. Blackmore*, L. R. 4 H. L. 610-623; 1 Story, Eq. Jur. § 145; and *Phillips v. Clagett*, 11 M. & W. 84.

It may be said that this doctrine that a release cannot apply or be intended to apply to circumstances of which the releasing party had no knowledge at the time of the release has no practical application to damages originating in the same cause of action; that, if this release had been expressly limited to such damages as were recoverable by reason of complainant's fractured arm and contused head, it would nevertheless operate as a bar to an action for the other part of his damages having a common origin in a single tort. The

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Damages.**

general rule is that damages resulting from one and the same cause of action must be sued for and recovered once for all. But this is a rule of procedure, a rule of which *Lord Blackburn*, in *Colliery Co. v. Mitchell*, L. R. 11 App. 138, said:

"I do not think it is one of those rules of law which depend upon natural justice. I think it is an artificial rule of positive law, introduced on the balance of convenience and inconvenience."

As a rule of positive law it has its exceptions. In *Roberts v. Railway Co.*, 1 F. & F. 460, the court refused to apply it in a case where the plaintiff's action was for personal injuries sustained in a railway accident, whereby he at the same time lost his hat. For the latter he had settled and given a receipt. This was pleaded as an accord and satisfaction. The plea was overruled, *Cockburn, C. J.*, saying:

"It could not be seriously urged that, if the plaintiff has been seriously injured, he is precluded from recovery because he agreed to accept two pounds for his hat."

This case was cited with approval in *Lee v. Railway*, L. R. 6 Ch. 527-537.

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The rule of procedure alluded to has application only where the plaintiff has split up his cause of action, and recovered judgment in one suit for part of his damages, and then brought suit for the other part. This is the real basis for the ruling in *Roberts v. Railroad*, cited above. In *Bliss v. Railroad Co.*, 160 Mass. 447, the court, upon mature consideration, held that the rule did not apply in cases where the parties had agreed upon a settlement of a part of the damages and released all right of action for the part so settled, and that such a release could not be pleaded as a bar to a suit for the other part, although that embraced in the settlement and that sued for constituted together but one cause of action. The case referred to is much in point, for the release, though intended to include only a part of the damages, was, in fact, so comprehensive as to include all the damages sustained by the plaintiff. Upon evidence that the release had been procured by fraud, the court confined it to the damage intended to be released, and permitted a recovery for the other part of the damages. The plaintiff had retained the money paid, and it was urged that this operated as a bar, just as the recovery of a judgment for one part of the injury would debar him. To this the court said :

"But there are good reasons for holding the contrary doctrine. If one sues to recover for an injury, he may well be held to include in his action all that he is entitled to sue for in respect to that cause of action. But if one is making a settlement the same reasons do not apply, and if he cannot make a full settlement he may make a partial one, and thus eliminate one element from the controversy."

As to the fact that the plaintiff had not paid back the money he had received, the court said :

"Why should he pay it back, when it represents only the sum agreed on for his compensation for that portion of his loss which he no longer seeks to recover for?"

In this aspect of the case it is a matter of no im-

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portance whether the plaintiff paid back or offered to pay back the money he received. He did, in fact, tender it back some three years after he received it. This delay is unimportant, as the statutes of limitation have not barred his suit, and he was entitled to retain it as a satisfaction for the part of his injury he had understandingly settled. If the release had, in fact, been procured by fraud, he could have shown this at law, the fact that the release was under seal out of the way. *Railway Co. v. Harris*, 158 U. S. 326; *Mullen v. Railroad Co.*, 127 Mass. 86; *Phillips v. Claggett*, 11 M. & W. 83-89; *Barker v. Richardson*, 1 Y. & J. 361; *Averill v. Wood* 78. Mich. 342; *Railroad v. Welch*, 52 Ill. 183; *Railroad Co. v. Lewis*, 109 Ill. 120; *Railroad Co. v. Doyle*, 18 Kan. 58; *Lusted v. Railroad Co.*, 71 Wis. 391; *Stone v. Railroad Co.*, 66 Mich. 76, 30 Am. & Eng. R. Cas. 600; *Dixon v. Railroad Co.*, 100 N. Y. 170, 26 Am. & Eng. R. Cas. 203. Many reputable authorities maintain that where a release is obtained by fraud it is not necessary that the money received be returned at all. That it may be credited upon the recovery is held to be sufficient. This seems to have been regarded as proper practice in *Railroad Co. v. Harris*, cited above. *Railroad Co. v. Doyle*, *Railroad Co. v. Lewis*, and *Mullen v. Railroad Co.*, all cited heretofore, are express authorities upon this point. It is, however, unnecessary to decide this question, and it is, therefore, reserved.

The facts stated in this bill are such as that it should have been entertained, and the demurrers overruled, upon the ground that the case stated was such as that the release would operate as a fraud if the defendant was suffered to rely upon it as an impediment to a recovery of that part of complainant's damage not discussed or considered, and not intended to be released. Reversed and remanded, with direction to overrule the demurrer.

NOTES.

Release of Damages.—It is the general rule that a release of a claim for damages for personal injuries sustained by the releasor

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may be avoided if it was obtained by fraud, unfair advantage, duress or mistake. See 20 Am. & Eng. Encyclopaedia of Law, p. 763; 7 Rap. & Mack's Dig. p. 6; Chicago, etc., R. Co. v. Lewis, 109 Ill. 120, 19 Am. & Eng. R. Cas. 224; Dixon v. Brooklyn City, etc., R. Co., 100 N. Y. 170, 26 Am. & Eng. R. Cas. 203; Buffin v. Milwaukee, etc., R. Co., 56 Wis. 325, 10 Am. & Eng. R. Cas. 716; Stone v. Chicago, etc., R. Cas., 66 Mich. 76, 30 Am. & Eng. R. Cas. 600, note 606; Union Pac. R. Co. v. Harris, 63 Fed. Rep. 800, 60 Am. & Eng. R. Cas. 266; Albrecht v. Milwaukee, etc., R. Co., 87 Wis. 105, 60 Am. & Eng. R. Cas. 266; Bliss v. New York Cent. R. Co., 160 Mass. 447, 60 Am. & Eng. R. Cas. 266; White v. Richmond, etc., R. Co., 110 N. Car. 456, 60 Am. & Eng. R. Cas. 266; Eagle Packet Co. v. Defries, 94 Ill. 598; Illinois Cent. R. Co. v. Welsh, 52 Ill. 184; and see the note to Eccles v. Union Pac. R. Co., 7 Utah 335, 48 Am. & Eng. R. Cas. 42.

Same—Extent of Injury Unknown.—A general release of all claims for injuries will not include an injury unknown at the time, and which was not considered in the settlement between the parties. Union Pac. R. Co. v. Artist, 60 Fed. Rep. 365, 59 Am. & Eng. R. Cas. 385. The court said: "General words, alone, in a release, are taken most strongly against the releasor. But when there is a particular recital followed by general words the latter are qualified by the particular recital." Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 126, and cases cited; 2 Pars. Cont. 633, note. The court below properly applied this rule to the release in this case. The general words in the last half of it are limited by the very specific recital of the injuries that the \$150 was to be in settlement of, which is contained in the first half of the release. It was the claims for these injuries, and for these only, that this release discharged the company from. The injury now complained of was then unknown to both parties, and their settlement was without reference to it. A disregard of the rule would work manifest injustice, and impose upon the defendant in error a release he did not intend to make. But in Rideal v. Great Western R. Co., 1 T. & T. 706, it was held that the release was binding although the releasor had sustained serious injuries of which he was unaware when he entered into the release.

Same—Representations that Injuries are Slight.—Where an injured passenger is induced by an officer of the company to accept money and execute a release by fraudulent representations that his injuries were trivial, and that if they should afterwards turn out to be more serious, he would still be in a position to obtain further compensation, he is not precluded from maintaining an action for the injuries received, provided such injuries turn out to be more serious than he had anticipated. Hirschfeld v. London, etc., R. Co., 2 Q. B. Div. 1, 46 L. J. Q. B. D. 1. The relationship of a medical man to his patient is one of trust and confidence, and he must act *bona fide* in advising him, or any settlement made through him, of a claim against a railway for a personal injury, in consequence of advice given *mala fide*, will be set aside. Rowe v. Grand Trunk R. Co., 16 U. C. C. P. 500. Plaintiff assumed to rescind a release of her claim against defendant, on the ground that it was procured by a false and fraudulent statement of defendant's agent that "her physician had stated that her injuries would soon be cured with proper treatment." *Held*, that it was not necessary that she should have enter-

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tained an unquestioned and positive belief in the correctness of the alleged opinion of the physician. It was sufficient if she so far relied on it and was so far influenced by it that it was the inducing cause of her executing the release. *Peterson v. Chicago, etc.*, R. Co., 38 Minn. 511.

Plaintiff was injured while a passenger on defendant's road. She executed to defendant a release in consideration of \$225, \$25 of which was paid her at the time of the release, and \$200 the next day. She claims that she was induced to execute the release by false representations of defendant. The court below, in its charge, submitted to the jury two representations as grounds on which she could avoid the release. As to one of these representations she had learned its falsity, and knew the facts, when she received the \$200. *Held*, error in the court to submit that representation to the jury as an independent ground to avoid the release. *Peterson v. Chicago, etc.*, R. Co., 36 Minn. 399.

Same—Miscarriage.—A release of a claim against a railroad company for damages for personal injuries to a woman, who feared that the injuries would cause a miscarriage, signed under the advice of her husband and his father and made for a valuable consideration, is binding, notwithstanding the subsequent occurrence of the result which she feared, and which fear caused her to hesitate in signing such release. *Eccles v. Union Pac. R. Co.*, 7 Utah 335, 48 Am. & Eng. R. Cas. 38.

Same—Release Intended to Apply Only to Injuries to Property.—While plaintiff was suffering from injuries received in a collision on the railroad of defendant, the agent of the latter procured him to execute, in consideration of \$50, a release under seal of all claims against defendant by reason of his property being destroyed at the time of the collision, and also for personal injuries received at that time. The jury found that the release for the injuries was not talked about during the negotiations, and that neither plaintiff nor the agent understood that the release covered such injuries. The value of the property destroyed exceeded \$50. The release was not read to plaintiff, who was sick in bed, and when handed to him he tried to read it but could not by reason of dizziness caused by the injuries. *Held*, that the release as to the personal injuries was not binding, and plaintiff's ignorance of its contents was not the result of such negligence as would preclude him from avoiding it. *Lusted v. Chicago, etc.*, R. Co., 71 Wis. 391; following *Schultz v. Chicago, etc.*, R. Co., 44 Wis. 638; *Bussian v. Milwaukee, etc.*, R. Co., 56 Wis. 326.

Mobile & O. R. Co. v. Wilson.

MOBILE & O. R. Co.

v.

WILSON.

(Circuit Court of Appeals, Seventh Circuit, Oct. 5, 1896.)

Charge of Court—Instructions.—The charge should not omit to state that in respect to the law of a case the instructions of the court are controlling, and that upon matters of fact, the credibility of witnesses, the weight of evidence, and the like, the jury, though it may be advised by the court, must finally exercise an independent judgment.

Contributory Negligence—Burden of Proof.—In federal courts it rests upon the defendants to show contributory negligence, and the plaintiff, besides proving the negligence charged, must show that he was injured thereby, and to what extent.

Instructions—Contributory Negligence.—A charge to the jury stated in effect that if, by reasonable care and prudence, the defendant company could have avoided the consequences of the plaintiff's negligence, but failed to do so, the plaintiff might recover, though guilty of contributory negligence, and in the next sentence the court said in substance, that the question of negligence in this respect, as in others, was to be determined "in view of all the facts and circumstances in the case." *Held*, that the second sentence was error in that it in effect eliminated from the case the question of contributory negligence.

IN ERROR to the Circuit Court of the United States, Southern District of Illinois. *Reversed*.

In this case the circuit court refused all special requests for instructions, and charged the jury as follows: "The declaration in this case contains three counts, each differing somewhat from the other, but they substantially charge the defendant railroad company with so negligently and carelessly operating its train, consisting of a locomotive and car, as that the plaintiff, who was in his wagon, driving across Vine street, in the city of Sparta, and at the time exercising due care and caution, was struck by such engine, and seriously and permanently injured. A number of acts of imputed negligence on the part of

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the defendant are specifically mentioned ; among them, that the train was running at a dangerous rate of speed, that no whistle was sounded or bell rung, or care or prudence shown in operating said train, at the time and place of the accident. Under the pleadings in this case the burden rests on the plaintiff to establish the negligence of the defendant, complained of in his declaration, by the preponderance of the evidence. There are two questions of fact in this case to be determined by you from the weight of the evidence: First. Was the defendant guilty of negligence in approaching the Vine street crossing, either in running at a dangerous rate of speed or in failing to give such signals as the law required it to give? What is a safe rate of speed, or what is a reasonable and timely warning, depends on or may depend on the circumstances. Of course, the speed of a train should not be so great as to render unavailing the warning of its whistle and bell ; and while it may be true, the fact that the speed of a train is greater than the maximum rate fixed by an ordinance is a circumstance from which negligence may be inferred, yet that is but a circumstance to be considered by the jury in connection with the other evidence and circumstances in the case. If the evidence in this case shows that the crossing was hazardous, greater care was alike required by both the defendant company and the plaintiff in approaching it. All reasonable precautions should have been taken by the railroad company to avoid injury to persons and property, and this includes such management of its trains and such warning of their approach, or such other reasonable precautions, as not to cause unnecessary risks to persons on or about the crossing. The ordinary or proper care required by the plaintiff when approaching a crossing was to listen and look, and to have acted with reference to his own safety, as a reasonably prudent man would have acted under the same circumstances. Whether the plaintiff, at the time of the injury, was, under all the circumstances of the case, in the exercise of such care as would be expected of a reasonably prudent and

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careful person under similar circumstances, is a question of fact submitted to the determination of the jury. If you believe from the weight of the evidence that the plaintiff was guilty of contributory negligence he cannot recover, unless you further believe, from the evidence, that the defendant railroad company might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence. If it could have done this, but failed to do so, the plaintiff may recover, although guilty of contributory negligence. These questions of due care on the part of the plaintiff and of alleged negligence on the part of the defendant are questions of fact to be determined respectively by you in view of all the facts and circumstances in evidence. If the weight of the evidence shows the defendant was guilty of the imputed negligence resulting in injury to the plaintiff when exercising ordinary care, then you should find the defendant guilty, and assess plaintiff's damages at whatever sum, in your opinion, the evidence, properly considered, may warrant. If it does not so show, you should find the defendant not guilty. The form of your verdict may be: 'We, the jury, find the defendant guilty, and assess the plaintiff's damages at' whatever you may agree upon under the evidence. If you find for the defendant, your verdict will be: 'We, the jury, find the defendant not guilty.' "

J. M. Lansden, for plaintiff in error.

J. M. Hamill, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge (after stating the facts as above). As we had occasion to say in *Railroad Co. v. Kelly*, 11 C. C. A. 260, 265: "Jurors are not trained lawyers, and, notwithstanding a general charge covering the issues of a case, it is the duty of the court, on proper request, to give the jury a statement of any distinct doctrine or propo-

Charge of Court—
Instructions.

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sition which is fairly and justly applicable to the issues or to an important phase of the case." A charge to a jury ought to be more than a skeletonized statement of the issues and of abstract propositions of law. The purpose is that the jury shall render an intelligent and discriminating verdict, and to that end ordinarily there must be, though at the expense of some repetition, a distinct and clear presentation, in the light of the evidence, of the different issues, and of their bearing upon each other and upon the general result. A full review of the evidence often may not be necessary, but some explanation of its relevancy and force, when the questions are intricate or close, should be given. This charge, though comprehensive and concise, on delivery doubtless was clear enough to the lawyers familiar with the case, and on the printed page it is, perhaps, within the comprehension of readers of average intelligence; but that the jurors, receiving it in the usual manner, would each properly understand it in all its phases and applications, is not probable, and, therefore, the special instructions asked should not have been refused solely because comprehended or implied in the meagre expressions employed. This charge, it is also to be observed, is lacking in important particulars. It omits to state that, in respect to the law of the case, the instructions of the court are controlling, and that upon matters of fact, the credibility of witnesses, the weight of evidence, and the like, the jury, though it may be advised by the court, must finally exercise an independent judgment. The burden of proof is only partially stated. In the federal courts it rests upon the defendant to show contributory negligence, and the plaintiff, besides proving the negligence charged, must show that he was injured thereby, and to what extent.

Contributory Negligence—Burden of Proof.

Exception was saved and error assigned upon the proposition in the charge to the effect that if, by reasonable care and prudence, the defendant company could have avoided the consequences of the plaintiff's negligence, but failed to do so, the plaintiff might re-

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cover, though guilty of contributory negligence. If understood to mean that if the servants of the defendant company, after perceiving the plaintiff's danger, by reasonable exertions, could have avoided the consequences, the company was liable notwithstanding the plaintiff's negligence, the proposition was not unobjectionable. *Coasting Co. v. Tolson*, 139 U. S. 551, and cases there cited; but in the next sentence, upon which also error is assigned, the court said, in substance, that the question of negligence in this respect, as in others, was to be determined "in view of all the facts and circumstances in the case." That was, in effect, to eliminate from the case the question of contributory negligence. It permitted the jury to conclude that, if the defendant's train had been run with reasonable care and prudence,—that is to say, at a proper speed, with bell ringing and whistle blowing,—the plaintiff would have escaped the consequences of his negligence, and on that ground was entitled to recover, notwithstanding his own negligence. For this error the judgment must be reversed.

Instructions—
Contributory
Negligence.

It was not error to refuse to direct a verdict for the defendant on the ground of contributory fault. The circumstances were such as to make that a question for the determination of the jury. The judgment is reversed, with directions to grant a new trial.

THORESEN

v.

LA CROSSE CITY R. CO.

(*Supreme Court of Wisconsin, Oct. 13, 1896.*)

Contributory Negligence—Question for Jury.—As a person driving was about to cross a double track street railway in the dusk of the evening, a car passed on the near track, preventing her from seeing

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a second car approaching in the opposite direction on the other track. Attempting to cross immediately after the car on the near track had passed, she was struck and killed by the second car. *Held*, that the question of her contributory negligence was for the jury.

Street Railways—Injuries—Assessment of Damages—Evidence.—In an action by a husband as administrator to recover for the negligent killing of his wife, under a statute authorizing the jury to give such damages as they deem fair and just in reference to the pecuniary injury resulting to the plaintiff from such death, it is competent to prove the husband's circumstances and financial condition in order to enable the jury to assess such damages.

APPEAL from La Crosse county circuit court. *Affirmed*.

E. C. Higbee and *Loscy & Woodward*, for appellant.
Bleckman, Bloomingdale & Bergh, for respondent.

CASSODAY, C. J. This action is to recover damages by reason of the death of the plaintiff's intestate, caused by a collision of the vehicle in which she was riding with the defendant's street car on the evening of October 7, 1892. It is undisputed that the defendant's double street-railway track runs north and south on Fourth street, and that the tracks were about 4 feet apart; that King street crosses the same at right angles, and that such double tracks extended for a distance of more than 200 feet north and south from the centre of King street; that at the time in question the deceased started in a milk wagon near the northwest corner of King and Fourth streets; that, at the time of starting, the horse's head was facing west on King street; that the deceased sat on the near side, and a boy, a little over 12 years of age, on the off side; that she drove at first westerly, and made a long turn around towards the southwest corner of King and Fourth streets. The boy testified to the effect that as they approached the street-car tracks on Fourth street he saw a street car standing still on the east track, about half a block south of King street; that she was then driving east; that he then saw the car coming from the south, until his view of it was cut off by another car, coming from the north, on the west track; that when he next saw the north-bound car the same was coming pretty fast, about two rods

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distant, and their horse was then upon the east track, and their wagon on the west track.; that the driver of that car at that time stood on the front end of his car, with the lines in his hands, and at first looked back at the side of his car, and then through it in the door, and kept looking in that direction all the time until the car struck the hind wheels of their wagon, and the injury occurred; that the deceased said nothing until they got on the east track, when she "hollered," and took hold of the whip, and then the horse went faster; that when the car struck the wagon it tipped over, and fell towards the east on Fourth street, and the horse walked a couple of steps south. At the close of the trial the jury returned a special verdict to the effect that the driver of the car was guilty of negligence in the management and operation of his car, which was the approximate cause of the accident from which the deceased came to her death; that at the time of the collision the deceased was driving southeast; that the collision occurred about 20 feet south of King street; that the deceased could not have seen the car coming north on Fourth street before she drove onto the street-car track; that the deceased's view of the car coming north was obstructed by the car going south at about the time she drove on the railway track; that the deceased was not guilty of any want of ordinary care which contributed to the injury; that they found for the plaintiff, and assessed the value of the services of the deceased to the plaintiff for the probable remainder of her life at \$1,500. From the judgment entered upon that verdict in favor of the plaintiff for the amount mentioned the defendant brings this appeal.

There is no claim that the finding of the jury to the effect that the defendant's negligence was the proximate cause of the injury is not supported by the evidence. The principal contention is that the deceased was guilty of contributory negligence. It is conceded that each track was 4 feet and 8 inches between the rails, and that it was only 4 feet between the two inside rails; in

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other words, from the west rail to the east rail was only a little over 13 feet. The horse's head was necessarily several feet from the wagon box, and still further from the seat occupied by the deceased; and the boy sat on the same seat, between her and the coming car. If she drove onto the tracks immediately behind the car going south, then, it may be, that she was not in a position to see the coming car until her horse was well onto the east track. True, the verdict finds that at the time of the collision she was driving southeast, and that the collision occurred about 20 feet south of King street. Since it appears that at the time she started to drive across the tracks her horse and wagon were on the south side of King street, and the west curb line of Fourth street was 14 feet west of the west rail of the west track, it would seem that she could not have turned to go southeast until she got onto the west track; otherwise the collision would probably have occurred more than 20 feet south of King street. The injury left her unconscious, and she died about eight hours afterwards. The result is that we are deprived of her version of the transaction. Whether she saw the car which did the injury, standing half a block south of King street, as the boy did, or afterwards saw it coming north, as he did, are, at most, matters of conjecture. In approaching the tracks she was, undoubtedly, bound to exercise ordinary care to avoid a collision with any moving car. She was bound to exercise ordinary care in observing whether there was any moving car at the place of crossing, or in the immediate vicinity. True, the danger of a car propelled by horse power, like the one in question, is not as imminent as one propelled by electricity or steam, since it necessarily moves much slower, and may be more readily controlled; but it differs from an ordinary wagon or carriage, in that it is confined to a fixed track, and hence cannot turn out to avoid collisions. This fact must, of course, be recognized by those riding in other vehicles. It must be remembered that, except where contributory negligence appears from the plaintiff's own showing, it is a matter

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of defense, and the burden of proving it is upon the defendant. *Hoye v. Railway Co.*, 67 Wis. 15, and cases there cited. In that case, as in this, the victim of the accident did not survive to give her version of the occurrence. Such being the law, it cannot be conclusively presumed that the deceased did not, at the time and place in question, look, listen, and prudently act upon the knowledge she thus acquired. *Id.* The difficulty of holding, as a matter of law, that the deceased was guilty of contributory negligence, is the fact of the intervening car moving south between her and the coming car, in the dusk of the evening, and just before she attempted to cross the tracks. In this respect the case is somewhat similar to *Duame v. Railway Co.*, 72 Wis. 523. See, also, *Winstanley v. Railway Co.*, 72 Wis. 375; *Winchell v. Abbot*, 77 Wis. 371; *Ward v. Railway Co.*, 85 Wis. 601. We must hold that the question of contributory negligence was for the jury.

The statute authorized the jury to give such damages as they deemed fair and just in reference to the pecuniary injury resulting to the plaintiff from such death. Rev. St. § 4256. To enable the jury to assess such damages, it was competent, under the repeated rulings of this court, to prove the husband's circumstances and financial condition. *Ewen v. Railway Co.*, 38 Wis. 613; *Johnson v. Railway Co.*, 64 Wis. 431, 432; *Wiltse v. Town of Tilden*, 77 Wis. 152; *Tuteur v. Railway Co.*, 77 Wis. 508, 44 Am. & Eng. R. Cas. 458; *Thompson v. Johnston Bros. Co.*, 86 Wis. 576. We find no material error in the record. The judgment of the circuit court is affirmed.

Street Railways -
Injuries - Assess-
ment of Damages.

McDivitt v. Des Moines St. R. Co.

McDIVITT

v.

DES MOINES ST. R. CO.

(Supreme Court of Iowa, October 14, 1896.)

Street Railways—Injuries—Negligence.—The plaintiff attempted to drive across a street car track before a car which was approaching, and his wagon was struck and overturned, and he was thrown out. The car stopped immediately after the accident, and then was again moved up against the wagon, striking it and injuring the plaintiff, who was in it. *Held*, that the negligence of the plaintiff in attempting to cross in front of the car did not prevent a recovery for the injuries caused by the negligence of the defendant in running against the wagon a second time.

Same—Question of Fact.—The negligence of the defendant in re-starting the car was a question of fact for the jury.

Appeal—Delay in Filing Abstract.—An additional abstract, containing the admission of an uncontroverted fact, which was not filed within the time fixed by the rules of the court, will not be struck out by reason of such delay, where it does not appear that the submission of the cause was delayed by the filing of such abstract, nor that prejudice has resulted from it.

APPEAL from Polk county district court. *Affirmed.*

Guernsey & Baily, for appellant.

Bishop, Bowen & Fleming, for appellee.

ROBINSON, J. In June, 1892, the defendant owned and operated a street railway on Sixth avenue, in the city of Des Moines. There were two tracks on that

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street, which extended from north to south—one east of the center of the street, which was used by cars going north, and one west of the center, which was used by cars going south. On a day in the month named, the plaintiff was in charge of a grocer's covered delivery wagon, drawn by two horses. He had made a delivery, and was driving northward on the west side of the street; and when he had nearly reached Center street he observed a car approaching rapidly from the north, and also teams, west

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of the west railway track, drawing lumber wagons. He continued on the west side of the street for a time, but finally, and when he thought he had ample time to do so, turned his horses to cross to the east side and avoid the approaching car and teams. Before the wagon had cleared the east track, it was struck and overturned by a car which approached from the south. The left leg of the plaintiff was caught and broken below the knee. When the plaintiff had submitted his evidence, and rested, the defendant filed a motion for a verdict in its favor. The motion was sustained, and a verdict was accordingly returned for the defendant; but the plaintiff thereafter filed a motion for a new trial which was sustained, and we are required to determine whether that ruling was authorized. The plaintiff claims that there was negligence on the part of the defendant, in that the north-bound car approached him at a high rate of speed, without giving any signal of its approach, and when he was plainly discernible, and his condition and danger were known to the employee or motorman who had control of the car; that when the collision occurred the car which caused it came to a full stop; that after his wagon was overturned, and while he was endeavoring to extricate himself from it, the motorman, knowing the danger to which the plaintiff was exposed, backed the car, and then ran it forward, striking the wagon a second time; that the leg of the plaintiff was caught at that time between the wagon seat and the pavement and broken,—and he seeks to recover the resulting damages. The defendant denies negligence on its part, and avers that the injuries of which the plaintiff complains were the result of his contributory negligence.

1. The plaintiff did not look for a car from the south before driving upon the east track, and the appellant has devoted much time and space to show that he was negligent in failing to do so. This may be conceded, for the purpose of this appeal; but it will be noticed that the plaintiff contends that he was injured after his peril

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gence.

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was known to the motorman, and when the act which caused his injury could have been avoided. He testifies that when his wagon was upset he went down with it, but remained in his seat and was unhurt; that when the car struck the wagon the horses broke loose, and the car and wagon stopped; that he then set his foot outside the seat at the side of the wagon; and that the car was then pushed against the wagon the second time, when his leg was caught and broken as stated. His statement that the car came to a stop at the moment of the collision, and that it was afterwards moved forward, is corroborated by the testimony of five disinterested witnesses. A lady who was in her house near by states that she heard a crash, and looked out, and saw the car started, and that it pushed the wagon a short distance up the street. Another lady was standing at the front door of her home, and saw the collision. She states that after the car first struck the wagon it seemed to back, and then push onto the wagon again. C. A. Bragg saw the accident, and states that it seemed to him that the car moved onto the wagon after the first collision. Mack Frazier testifies that he saw the accident, and that the car was stopped, and then started and pushed the wagon a short distance. Robert McNutt testifies that he saw the car moved onto the wagon while it was lying on its side. If the motorman moved the car against the wagon a second time, and thus caused the injuries in question, the defendant is presumptively liable, even though the first collision was due wholly or in part to the negligence of the plaintiff. The evidence justifies the conclusion that the motorman knew, or should have known, that the plaintiff was in peril when the wagon was overturned, and it was his duty to use reasonable care to guard against further harm. It is said that the evidence does not show that the car was started by the motorman; that it may have been started without his volition, in consequence of some injury to its machinery which resulted from the collision, or that it might have been started in the excitement of the mo-

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ment, under circumstances which would not constitute negligence, or that it was only checked by the collision, and afterwards went forward of its own momentum. There was evidence to the effect that the car came to a full stop, and that the motorman was at his post, in charge of the car. There is nothing to show any injury to the machinery, nor that the motorman, while laboring under excitement, did that which should not have been done, and for which the defendant should not be held responsible. It must be presumed from the evidence given that the motorman had perfect control of the car, and that its movements were according to his will. If this was not true the fact might have been shown by the defendant. This is not a case for the application of the rule announced in *Asbach v. Railway Co.*, 74 Iowa, 250, and followed in *Rhines v. Railway Co.*, 75 Iowa, 598, and *Wheelan v. Railway Co.*, 85 Iowa, 175, that a theory is not established by circumstantial evidence unless it is the only one that can be fairly or reasonably drawn from the evidence.

2. The appellant discusses the evidence, and insists that it fails to show negligence on the part of the defendant. Much of what is said on that point merely goes to the reasonableness and value of the testimony of different witnesses. It is sufficient to say in regard to this branch of the case that the question of negligence was one of fact, for the determination of the jury, and that the evidence in regard to it was sufficient to require a submission of the case to the jury. The court properly set aside the verdict which it had directed, and ordered a new trial.

Same—Question of Fact.

3. A motion to strike an additional abstract filed by the appellee, on the ground that it was not filed within the time fixed by the rules of this court, has been submitted. It does not appear that the submission of the cause was delayed by the filing of the additional abstract, nor that prejudice has resulted from it, and when that is the case it is not our practice to strike an additional abstract from the files. In this case there is an additional reason for not sus-

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taining the motion. It was admitted in the district court that the defendant is a corporation, and that it owned and operated the railway and cars at the time of the accident, and there was no controversy in that court in regard to those matters. That admission was omitted from the abstract of the appellant, but, as it related to a matter which had not been controverted, the omission was overlooked by the appellee until the appellant's argument was served. In that it was claimed that there was no proof that the defendant was in any manner concerned in the collision, and the additional abstract supplying the omission was then prepared and served. It is plain that the admission should have been set out in the abstract of the appellant, and we cannot permit the appellant to profit by its own wrong in omitting it. The motion to strike is overruled, and the order of the district court granting a new trial is affirmed.

WHITE

v.

WORCESTER CONSOL. ST. R. CO.

(Supreme Judicial Court of Massachusetts, Oct. 22, 1896.)

Electric Street Cars—Obstruction of Tracks by Vehicle.*—Neither the driver of a vehicle nor the motorman of an electric car has a right to assume that the other will keep out of the way at its peril, but the motorman has a right to demand that the wagon shall not obstruct the car by unreasonable delay upon the track.

Same—Care to Be Exercised by Motorman.—If the driver of a wagon, in crossing the track of an electric street railway, is not aware of the close proximity of a car, and the motorman on such car sees the wagon, and sees that the driver is proceeding in the ordinary way around an obstacle in the street, and clearing the

**Note.*—See 23 Am. & Eng. Ency. of Law p. 1028; 4 Rap. & Mack's Digest 271; and see notes 56 Am. & Eng. R. Cas. 608; 19 Id. 131, 127, and see *Gibbons v. Wilkesbarre*, etc., R. Co. 155 Pa. St. 279; 56 Am. & Eng. R. Cas. 600; *O'Neill v. Dry Dock*, etc., R. Co., 129 N. Y. 125; 52 Am. & Eng. R. Cas. 573; *Carson v. Federal St. etc., Pass. R. Co.*, 147 Pa. St. 219, 50 Am. & Eng. R. Cas. 462.

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track with reasonable speed, due care requires the motorman to move slowly, or stop, until the wagon is out of the way.

Same.—Where one drives upon a street car track in order to get around an obstruction in the street, a motorman of a car approaching from the rear has no right to presume that he will not drive back to the same side of the street, but will keep on across the track to the opposite side.

EXCEPTIONS from Worcester county superior court.
Exceptions overruled.

W. A. Gile and George H. Mellen, for plaintiff.

Charles C. Milton and Herbert Parker, for defendant.

HOLMES, J. This is an action for running down the plaintiff. He had driven across the defendant's track from the right side of the road, in order to pass around a standing vehicle, which was in his way, and he was crossing back again to his proper side of the road, when his rear left wheel was struck by an electric car which came up behind him. According to the defendant's evidence, the accident was due to the plaintiff's stopping suddenly just in front of the car; but the plaintiff testified that he did not stop, but was driving continuously around the other vehicle. Other details of fact were in dispute.

The defendant asked for an instruction that, if the plaintiff had an unobstructed view of the approaching car, and there was nothing to prevent the plaintiff from turning off the track, the driver of the car had a right to assume that the plaintiff would seasonably turn off the track to avoid accident. This was refused, and we are of opinion that the refusal was correct. We do not suppose that the instruction asked was intended as a proposition of fact based on the practice and experience of the community. In some parts of the state, at least, it is well known that drivers of vehicles wishing to cross a track assume that electric cars will look out for them at least as much as they look out for the cars. But we suppose that the request was intended to embody a statement of the rights of electric cars irrespective of practice, and to put street railways on very

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nearly the footing of steam railroads. Whatever may be the law as to the latter, there is a great difference between the two cases. Electric cars are far more manageable, and more quickly stopped, than trains upon steam railroads. Their tracks are in the highway, where all vehicles have a right, not merely to cross, but to travel. In view of the inability of the cars to leave their tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them; but, subject to that, and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid a collision. See *Galbraith v. Railway Co.*, 165 Mass. 570, 580; 3 Am. & Eng. R. Cas. N. S. 628. Neither has a right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the wagon shall not obstruct it by unreasonable delay upon the track. If the jury believed, as they might, that the plaintiff did not know of the close proximity of the car, and that the motorman did see the plaintiff's wagon, and saw that he was proceeding in the ordinary way around an obstacle, and clearing the track with reasonable speed, they well might find that due care required the motorman to move slowly, or stop, until the plaintiff was out of the way. In *Glazebrook v. Railway Co.*, 160 Mass. 239, the plaintiff was coming towards the car, and the driver had a right to expect him to turn out seasonably, as there was nothing to prevent it. Here, according to the plaintiff's story, he was turning off as quickly as he could, in order to regain his side of the way.

The defendant asked for a second instruction that, if the plaintiff was proceeding in his vehicle ahead of the car, and in a course outside of, but parallel with, the track, the motorman had a right to presume that the plaintiff would not turn upon the track, and under such circumstances the motorman is warranted in proceeding at the usual rate of speed. This was also refused. With reference to the undisputed facts in the case, it would have been misleading and incorrect. If anything

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could be said by a judge as to what the plaintiff might be expected to do, it would be that he might be expected to turn back to the right of the road where he belonged, and from which he had come just before. Even if no part of his previous movements had been seen, the right of the road was the part to which he naturally would tend.

Exceptions overruled.

NOTE.

A street-railway company has no superior right on a public street to that of the public at large, except the right to lay its track and operate its cars; and if it adopts a dangerous propelling power it must be held to a degree of care proportionate to the increase of danger to the public. A street car has the right of way in case of meeting a person or vehicle, but each party, in order to avoid accident, must exercise ordinary care and such reasonable prudence as the surrounding circumstances require; and what may be considered ordinary care in one case may amount to culpable negligence in another. The existence of negligence in each case must depend on the circumstances peculiar to it. *Hall v. Ogden City St. R. Co.*, (Utah), 4 Am. & Eng. R. Cas., N. S. 77.

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(*Circuit Court of Appeals, Sixth Circuit, October 5, 1896.*)

Mortgagee a Necessary Party to Action against Mortgaged Property.—Where a street railway company has mortgaged its whole property and franchises, the mortgagee acquires a substantial right in its street easements, and cannot be deprived of such security by a proceeding directly impeaching their validity and duration without being made a party thereto.

Federal Courts—Construction of State Statutes.—Where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends by the highest court of the state whose statute is involved, if a court of the United States obtains jurisdiction of a question touching the validity, effect or obligation of such a contract, it will, while "leaning to an agreement with the state court exercise an independent judgment as to the validity and meaning of such contract, although the meaning and validity of state statutes may be an element in the case, and will not be bound to follow

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opinions of the state court construing such statute, if such decisions were rendered after the rights involved in the controversy originated.

Street Grants—Construction of Statute.—A state statute provided that any inclined plane railway company, organized under an act passed in 1852 relative to the creation and incorporation of such railway companies, should have power to hold, lease or purchase, and maintain and operate such portion of any street railroad, leading to or connected with such inclined plane, as might be necessary for the convenient dispatch of its business, upon the same terms and conditions upon which it operated its inclined plane. *Held*, that the holding, leasing, maintenance, and operation of such railways was to be subject to the terms and conditions of the act of 1852, and that the statute did not extend the terms of all street grants held by any company, nor confer upon it the perpetual right to continuously occupy streets upon which it had tracks, and any others occupied by lines of other companies which might be thereafter leased or purchased, because of the fact that the duration of a corporation, in that state, is unlimited.

Right of Local Authority to Limit Duration of Street Grant.—Where power is conferred on a local authority by the legislature of a state to impose terms and conditions upon railroad companies for the use of the street prior to such use, and to exclude them altogether, unless resort be had to condemnation, the right to agree upon the duration of such occupancy is obviously implied, and the right to limit the period of the grant is also involved.

Capacity of Corporation to Accept Limited Street Grant.—The fact that the corporate life of a corporation accepting a street grant is for an unlimited term in no way abridges its capacity to accept a grant for a shorter term.

Special Act.—An act applying to all inclined plane railroad companies which had been organized under a certain act allowing the creation of such companies, and operating to confirm all such companies in their ownership and operation of street railroads so far as such maintenance and operation had been invalid by defect of power, is not void as a special act.

Presumption of Abandonment—Non-User.—Where a street railway company has for twenty years not used certain streets among those which it was allowed to use by ordinance, such disuse, in the absence of countervailing circumstances is regarded as an abandonment of the grant as regards the streets not used.

Change of Motive Power—Expense—Estoppel.—Under a state statute providing that no other motive power than animals should be used by street railway companies on the public highways occupied by such companies without the consent of the board of public works, in any city having such a board, a street railway company, with the consent of the board of public works of a city, expended a large sum in changing the motive power from horse to electricity. *Held*, that such expenditure under resolutions of the board of public works did not estop the city from denying the rightful occupation of the streets by the company, and did not operate to extend the franchise of such company, the board not having power to grant or extend franchises at that time.

Record as Evidence.—Where a case has been pending in a court, and a receiver has been appointed in such court for the property in-

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involved, the judge of the circuit court may receive the record of such case in order to ascertain his power to grant relief.

Dispossession of Federal Receiver—State Court.—Where a federal court has first obtained possession of property through the appointment of a receiver, any application to dispossess him should be made to the court appointing him, and not to a state court.

APPEAL from the Circuit Court of the United States, Western Division of the Southern District of Ohio.

This suit involves the validity and duration of the street franchises claimed by the Cincinnati Inclined Plane Railway Company, a corporation organized and existing under the laws of the state of Ohio, and owning and operating a line of street railway occupying certain streets in the city of Cincinnati. The street grants claimed and occupied by the said railway company are held and claimed under and by virtue of acts of the legislature of Ohio and ordinances of the city of Cincinnati. The questions arise under an original bill filed by the Louisville Safety-Vault & Trust Company, a corporation organized and existing under the laws of the state of Kentucky. The complainant company is the trustee under a mortgage executed by the Cincinnati Inclined Plane Railway Company, January 1, 1889, duly recorded. Case Stated. This mortgage was made for the purpose of securing an issue of \$500,000 in negotiable bonds, the principal being payable in 1914, with interest coupons attached, payable semi-annually. Of these bonds \$375,000 have been issued and are in the hands of unknown holders, for value. The remainder are held by the complainant trust company for the purpose of taking up a prior mortgage made by the same company and secured upon the same property. The property mortgaged embraces all of the property of the mortgagor company, including its street franchises, rights of way, leases, contracts, iron rails, street cars, and equipments of every kind and character. The bill alleges, and the fact is, that the value of the property mortgaged consists principally in its street franchises and rights of way; that, aside from the value of the iron rails, forming a fixed track

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upon the streets of the city, the rolling stock and other equipment of the company is of comparatively small value, and wholly insufficient, if removed from the streets of Cincinnati, to secure the bonds outstanding. The bill alleges that the defendant, the city of Cincinnati, denies the right of said Cincinnati Inclined Plane Railway Company to further occupy the streets of the city with its rails and equipments, and claims that the said railway company is a trespasser upon the streets mentioned in the bill and is unlawfully maintaining and operating its line of street railway thereon, and through its officers and agents threatens to remove said tracks and appliances for the operation of the cars thereon, and to grant the right to use the same to a rival company holding and operating a parallel competing line in said city. The bill charges that the actings and doings of the said defendant are wholly unlawful and contrary to equity and good conscience ; that they are very hurtful to said railway company's credit and business, and tend greatly to depreciate its bonds in the market and destroy the security thereof, and thereby cripple it in its ability to serve the public ; and that, if permitted to remove its tracks from the streets, as it threatens to do, it will almost wholly destroy the security conveyed to the complainant, and upon the faith of which the bonds of the said company have been negotiated. The bill sets out the charter and other provisions made by the legislature of Ohio and the ordinances of the city of Cincinnati under which the said Inclined Plane Railway Company claims a right to continue the exercise of its franchises as a street railway company upon the streets of Cincinnati, and insists that its said street rights are perpetual, or are at least for a term not yet expired, and prays that the city be restrained from its threatened acts of destruction, and from granting to any other company the street franchises lawfully owned and exercised by the said mortgagor company. The answer of the city is in substance an assertion that the street rights of the said Inclined Plane Railway Company were either invalid, as having been granted without

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authority, or have expired by limitation, and insists that the said company no longer has any legal right to occupy the streets in controversy with its tracks, equipments, etc. It sets out that this contention has been heretofore the subject of a direct litigation between the city and the mortgagor corporation, and that in said suit it has been determined finally that certain of the street rights claimed had expired by limitation, and that certain other street grants claimed had never been lawfully granted and were void; that in said suit it was adjudged that the said company had no longer a right to occupy the controverted streets against the will of the city; and that an injunction had been awarded to prevent the further occupation thereof, though this injunction had been suspended until further direction of the court. The decree thus relied upon as an answer to the bill of the complainant was pronounced in the case of Cincinnati v. Cincinnati Inclined Plane R. Co., at a general term of the superior court of Cincinnati, and is reported in 30 Wkly. L. Bul., 321 *et seq.* An appeal was taken from that decree to the supreme court of Ohio, and there affirmed, "for the reasons stated in the opinion of the superior court." See 52 Ohio St. 609. The answer further insists that, whether the United States courts are obliged to follow the opinion of the supreme court in the case cited or not, the conclusions therein reached were right and proper, and that, if this court shall exercise an independent judgment in respect to the validity, extent, and duration of the street franchises claimed by the Inclined Plane Railway Company, the opinion of the supreme court of the state properly interprets the street contracts of that company, which is, therefore, a trespasser upon the streets, and subject to be removed as such. Upon the final hearing the circuit court dismissed the bill. Louisville Trust Co. v. Cincinnati, 73 Fed. Rep. 716.

Humphrey & Davis and St. John Boyle (E. A. Ferguson, of counsel), for appellant.

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Fred. Hertenstein and W. H. Whittaker (John C. Healy and J. D. Brannan, of counsel) for appellee.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The questions involved are as to the extent, validity, and duration of the contract rights of the Cincinnati Inclined Plane Railway Company under which it occupies, with its tracks, poles, wires, and other equipment, certain streets of the city of Cincinnati, and upon which it maintains and operates a street-car line. That these street easements originate in certain statutes of the state of Ohio and certain ordinances of the city of Cincinnati does not affect their character as contracts entitled to the protection afforded by the constitution of the United States. The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires, and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in the absence of express restrictions, of being sold, conveyed, assigned, or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights. Such a grant, as we had occasion to decide in *Detroit Citizens' St. R. Co. v. City of Detroit*, 22 U. S. App. 570-580, may be for a term longer or shorter than the corporate life of the company receiving it, the duration of the estate being dependent upon the terms of the grant and the power of the grantor to make it. We then said that there was "nothing in the nature of the property rights involved in a grant of an easement in the streets for street-railway uses which distinguishes it from other property acquired by a corporation in the exercise of its franchises." In *Railroad Co. v. Delaware*, 114 U. S. 501, it was held that a grant by a municipal corporation to a railway company of a right of way through certain streets of the city, with the right to construct its railway thereon and maintain and

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occupy them in its use, is a franchise which may be mortgaged, and would pass to a purchaser at a sale under a foreclosure of the mortgage. There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which would prevent such easements from passing to a purchaser at foreclosure sale. It, therefore, follows that the complainant under the mortgage mentioned has acquired the substantial right in the street easements of the mortgagor company, and cannot be deprived of this security by a proceeding directly impeaching their validity and duration without being made a party thereto. It is true that a grantor can transfer no greater estate or interest than he has, and that the title in the grantee's hands must be subject to all the burdens and limitations which rested upon it at the time of the conveyance. But in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301-314, 60 Am. & Eng. R. Cas. 362, MR. JUSTICE BROWN in delivering the opinion of the court, said :

Mortgagee a Necessary Party to Action.

"While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to represent him, like the trustee of a mortgage bondholder, is made a party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree."

See also, *Campbell v. Hall*, 16 N. Y. 575; *Hassall v. Wilcox*, 130 U. S. 493; *Trust Co. v. Folsom*, 75 Fed. Rep. 929.

The mortgage under which the complainant is the trustee was executed before the suit in the state court was begun, and we think there is no reason why a mortgage of property interests, such as the street grants claimed by the mortgagor company, should be concluded by a decree to which only the mortgagor was a party, than if the mortgage had been on a different

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character of estate. *Baltimore Trust & Guarantee Co. v. Mayor, etc., of City of Baltimore*, 64 Fed. Rep. 153.

The learned counsel for the city have not relied upon the decree of the state court as an adjudication binding upon the complainant, but they have insisted that the opinion of the Ohio supreme court in the case of *City of Cincinnati v. Cincinnati Inclined Plane Ry. Co.* is to have much the same effect, and as effectually prejudices the question here involved, as if the city of Cincinnati had made the present complainant a party defendant to that suit. The contention is that it is the duty of this court to accept that opinion as a conclusive construction of the charter powers of the city of Cincinnati, and of the Cincinnati Inclined Plane Railway Company, and likewise a conclusive interpretation of the scope, effect, and duration of the various contracts or ordinances under which the mortgaged easements and franchises originated. If this be true, the constitutional right of the complainant, as a citizen of a state other than Ohio, to have its rights as a mortgagee defined and adjudged by a court of the United States is of no real value. If this court cannot for itself examine these street contracts, and determine their validity, effect, and duration, and must follow the interpretation and construction placed on them by another court in a suit begun after its rights as mortgagee had accrued, and to which it was not a party, then the right of such a mortgagee to have a hearing before judgment and a trial before execution is a matter of form without substance. The better *forum* for a suitor so situated would be a court of the state. Upon appeal to the supreme court its former opinion might be reconsidered, and judgment rendered according to right and justice, notwithstanding a former erroneous opinion interpreting the same legislative acts and construing the same contractual ordinances. But it is said that the questions here involved are as to the validity and proper interpretations of Ohio statutes, Ohio charters, and local city ordinances, and that the supreme court of the state is pre-eminently the proper tribunal for the determination of all such questions,

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and that the courts of the United States accept the interpretation of a state statute by the highest court of the state as settling its validity and meaning; and the cases of *Leffingwell v. Warren*, 2 Black 599; *Norton v. Shelby Co.*, 118 U. S. 425; *In re Duncan*, 139 U. S. 449; *Detroit v. Osborne*, 135 U. S. 492; *Railroad Co. v. Robertson*, 22 U. S. App. 187; *Nason's Adm'r v. Railroad Co.*, 22 U. S. App. 220; *Sanford v. Poe*, 37 U. S. App. 379,—as well as other cases of the same character, are cited to support this contention.

The general rule touching the duty of United States courts to adopt and follow the construction of state statutes, announced by the highest court of the state whose statute is involved, is well settled, and the rule is over and over again stated in the cases cited, and in many others. But there are certain well-recognized exceptions to this general rule. One of them is that if contracts and obligations have been entered into upon the faith of existing judicial constructions of state statutes, the courts of the United States will not regard themselves as under any duty to conform to later decisions reversing earlier opinions, upon the faith of which citizens of other states have acquired rights or assumed liabilities. *Douglass v. Pike County*, 101 U. S. 677.

So, where a question involved in the construction of a state statute practically affects those remedies of creditors which are protected by the constitution, courts of the United States will exercise an independent judgment as to the meaning of such statutes, and will not be bound by the decisions of state courts, and this, whether the case arises upon a writ of error under the twenty-fifth section of the judiciary act, or is a case where the jurisdiction was dependent upon citizenship alone. *Butz v. City of Muscatine*, 8 Wall. (U. S.) 575. So we think another well-grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends by the highest court of the state whose statute is involved.

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In such a case, if a court of the United States obtains jurisdiction of a question touching the validity, effect, or obligation of such a contract, it will, while "leaning to an agreement with the state court," exercise an independent judgment as to the validity and meaning of such contract, although the meaning and validity of state statutes may be an element in the case, and will not be bound to follow opinions of the state court construing such statute, if such decisions were rendered after the rights involved in the controversy originated. *Burgess v. Seligman*, 107 U. S. 20, 9 Am. & Eng. R. Cas. 655; *Pleasant Tp. v. Aetna L. Ins. Co.*, 138 U. S. 67.

In *Burgess v. Seligman*, the case involved the construction of a Missouri statute, which provided that persons holding stock in Missouri corporations as collateral security should not be liable for unpaid assessments on such stock. Three suits were brought against Seligman for unpaid assessments. Two of these suits were in the state court and the third was in the United States circuit court. Seligman held the stock as collateral security, having received it as collateral from the corporation issuing it. He claimed that under the Missouri statute referred to he was exempt from liability to creditors for unpaid assessments. This view was adopted by the United States court, and from the judgment the creditor appealed to the supreme court. Pending this appeal the two suits in the state court were decided adversely to Seligman, and appealed to the supreme court of the state. The Missouri court affirmed the judgments against Seligman, holding that under a proper construction of the Missouri statute the exemption did not apply to one holding unpaid shares of stock as collateral security from the corporation itself. These decisions were delivered before Seligman's case, pending in the supreme court of the United States, came on to be heard. Upon the trial in the latter court it was pressed upon the court that the opinion of the supreme court of Missouri, construing a Missouri statute, conclusively determined its meaning. Concerning this claim, the court, through MR. JUSTICE BRADLEY, said:

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“ We do not consider ourselves bound to follow the decision of the state court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean toward an agreement of views with the state courts, if the question seems to them balanced

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with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions."

Some significance may have been attached to the fact that the Missouri decisions were not made until after the case in the circuit court had been tried and decided. In that particular the case is to be distinguished from the one at bar. But that fact was not the vital fact in the case. Before the pending case was heard upon writ of error, the supreme court of Missouri had reached a contrary conclusion as to the meaning of the statute involved from that entertained by the United States circuit court. The question as to the right meaning of that statute was the question involved upon the writ of error. If there was any fixed principle by which the courts of the United States were bound under all circumstances to follow the state court in the construction of state statutes, where contracts had not been entered into upon the faith of earlier and conflicting decisions, the mere circumstance that such decision was made after the circuit court had heard and decided the case was not enough to justify a departure from the rule when the same case came on to be heard in the supreme court.

In *Sanford v. Poe*, 37 U. S. App. 378, the circuit court construed the act there involved before the

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state court had made any decision. But when that court was advised of that decision a rehearing was allowed, and the former opinion revoked, upon the express ground that it was the duty of the United States courts to adopt and follow the Ohio court as to the construction of the Ohio tax law. *Western Union Tel. Co. v. Poe*, 64 Fed. Rep. 9. This action of the circuit court was approved by this court, upon the ground that the suit involved no rights or contracts entered into before such decision. *Sanford v. Poe*, 37 U. S. App. 385. We accordingly find that MR. JUSTICE BRADLEY states the rule to be that, "when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued." The principle we deduce from this decision finds support in the subsequent case of *Pleasant Tp. v. Aetna L. Ins. Co.*, 138 U. S. 67, where a decision of the state court, made before action begun, was relied upon as determining the proper interpretation of the state statute involved. In that case the question involved the constitutionality of an Ohio statute, authorizing Pleasant Township to borrow money and issue bonds for the purpose of building a railroad. Under this statute the bonds in question were issued. Subsequently the supreme court of Ohio, but after the bonds had been issued, held the statute void under the Ohio constitution. *Wyscaver v. Atkinson*, 37 Ohio St. 80. In a suit against the township upon certain of these bonds, this decision of the Ohio court was relied upon as a conclusive determination of the invalidity of the act under which the bonds had been issued. The opinion of the supreme court was by MR. JUSTICE BREWER, who said:

"We are not concluded by that determination. In matters of contract, especially, the right of citizens of

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different states to litigate in the federal courts of the various states is a right to demand the independent judgments of those courts. The settled law in that respect is well stated in the case of *Burgess v. Seligman*, 107 U. S. 20-33, '9 Am. & Eng. R. Cas. 655."

Upon an original consideration of the question the supreme court found itself in accord with the supreme court of Ohio, and the acts under which the bonds had been issued were held void as a result of the independent judgment of the court.

It is said that this case involves no question as to a law impairing the obligation of contracts, and no questions of commercial law, but that the statutes and ordinances involved concern alone the powers of a municipality of the state of Ohio, and those of a private corporation of the same state, and that the validity and meaning of such acts and ordinances is peculiarly a question which should be determined by courts of the state. The answer to that is that contracts and obligations have been entered into before the courts of Ohio had judicially determined the nonvalidity of certain ordinances upon which those contracts rest, or construed the meaning of the law under which the mortgagor corporation was organized, or the later act enlarging its powers. The validity, effect, and duration of the street easements granted or claimed under these laws and ordinances is a question which this complainant is entitled to have decided by the courts of the United States, and the opinion of the supreme court of Ohio, while entitled to the highest respect as a tribunal of exalted ability, can be given no greater weight or respect than its reasoning shall demand, where the contract rights of a citizen of another state are involved, who was neither a party nor privy to the suit in which that opinion was delivered. The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statutes and city ordinances, out of which the rights of this complainant spring, is the fact that it is a citizen of another state, and that the contract under which it has acquired an interest originated prior

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to the judicial opinion relied upon as foreclosing our judgment.

This brings us to a consideration of the statute and city ordinances upon which depend the contract rights of the Cincinnati Inclined Plane Railway Company to occupy the streets of Cincinnati. Prior to 1860 there were no statutory provisions in Ohio under which street-railway companies proper could be organized; and no statutory laws specially affecting street railroads. Such companies as were incorporated to operate street railways prior to April 10, 1861, were formed under the general act for the incorporation of steam railroad companies of May 1, 1852. Neither were there any statutes regulating the organization, powers, or rights of inclined plane railway companies as such, until the act of April 12, 1876, and companies for the maintenance and operation of railway companies of the latter description were likewise organized under the steam railway act of May 1, 1852, prior to the passage of the inclined plane railway act of April 12, 1876. An inclined plane railway is best described by its name. Companies organized to build and maintain such a railway were intended for the purpose of constructing and operating an inclined plane by which passengers in cars were carried up from a valley or basin to the top of a hill or elevated plateau having a steep ascent. The well-known fact that Cincinnati is situated in a level plane, surrounded by a high and steep plateau, made it important that some means should be adopted by which easy communication might be had between the city and its hill suburbs. In the case of *City & Suburban Tel. Assoc. v. Cincinnati Inclined Plane R. Co.*, 23 Wkly. L. Bul. 165, JUDGE TAFT thus describes the situation of Cincinnati, and the utility of such a public work. He said :

"It is common knowledge that the great difficulty to be overcome in reaching the plateau about the city was in climbing the hills, and that the instrumentality by which that was accomplished became the principal feature of any such plan. The approach to the bottom and the departure from the top were incidental, and were

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certainly necessary to get passengers to the place of ascent and descent."

The inclined plane proper seems to be the most costly and vital part of such a railway, and as the controlling feature gave its name to the entire scheme, including therein as incidents the approach thereto from the city at its base and the suburbs on the hilltop. As before stated, there was no special provision in the Ohio statutes for the incorporation of inclined plane railway companies until 1876. The company whose franchises are here concerned was organized in April, 1871, under the provisions of the general corporation act of Ohio of May 1, 1852, providing for the incorporation of steam railway companies, for the purpose of constructing a railroad, the termini of which were to be in the city of Cincinnati and the village of Avondale. In February, 1889, the Avondale terminus, by proceedings in accordance with the law of Ohio, was extended to Glendale in the same county. In 1871 the said railway company constructed an inclined plane railway which extended from the base of the hill at or near Mulberry street to the top of the hill on Locust street. The length of this inclined plane was about 800 feet, within which distance it attained an elevation of about 300 feet. This inclined plane crossed three hillside streets of the city, upon abutments or piers resting in the streets, the track being so elevated as not to interfere with the use of the streets so crossed. Though in part the plane was constructed on land owned by the company in fee, yet a part thereof occupied Locust street, one of the streets of the city, and, as before mentioned, it crossed upon abutments three hillside streets of the city. Locust street was thus occupied, and the other streets crossed, under a contract between the city and the company contained in an ordinance passed June 16, 1871. That ordinance granted the right to so occupy Locust street, and to cross Miami, Baltimore, and Dorsey streets, upon certain terms and conditions, one of which was that the railroad should be so constructed "as not to obstruct the ordinary passage along the streets,"

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and that the mode in which the work should be done should be approved and done to the satisfaction of the city's civil engineer. It was also provided that the grant should continue only for a term of 20 years, and take effect only when the company should file a written acceptance. By another ordinance, passed December 1, 1871, permission was granted to the said railway company to lay a double surface track from a point at the base of its inclined plane, at or near the head of Main street, on the north side of Mulberry street; thence south along Main street to Liberty street; thence west on Liberty street to Walnut street; thence south on Walnut street to Fifth street,—Market space; thence east on Fifth street to Market space. This grant was made upon certain terms and conditions therein stated, unnecessary to be here mentioned, except that it was provided that no motive power except horses and mules should be used on said tracks, and that the charges for transportation over said portions of the company's line should not exceed five cents for each passenger, and that it should keep for sale tickets in books of 25 for one dollar. It was also provided that, before construction of the said track should be commenced, the company should obtain the consent of a majority in interest of the owners of property abutting thereon. This grant was made in pursuance of a petition theretofore filed with the board of aldermen and councilmen of the city of Cincinnati, which recited that the petitioner had been incorporated under the law of Ohio for the purpose of constructing a railroad from said city to the village of Avondale. There was no limitation expressed in the ordinance as to the term of this contract. A third ordinance, passed October 27, 1875, granted to the Cincinnati Inclined Plane Railway Company permission to use and occupy for a period of 30 years, with a double track, Locust street, commencing at the top of the inclined plane heretofore described, thence north to Mason street, and Mason street from Locust east to Auburn street, and Auburn street, with a single track, from Mason street to Vine street, and Vine street, by a double track, to

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the corporation line of the city of Avondale, with the privilege of using any tracks which may be laid by any other company. This ordinance was also granted upon certain terms and conditions, mentioned therein, one of which was that no motive power should be used except horses and mules, and that the grant should terminate in 30 years. By an ordinance of August 19, 1864, the city council of Cincinnati established a street-railway route, known and described as "Route No. 8." This route commenced at the corner of Main and Fifth streets; thence on Main street to Orchard street; thence on Orchard street to Sycamore street; thence on Sycamore to Liberty street; thence to Auburn street, on such streets or parts of streets as the promoter for building such street railway shall select; thence on Auburn street to the northern corporation line of the city, returning by the same track with suitable turnouts to the corner of Sycamore and Orchard; thence on Sycamore to Franklin street; thence on Franklin to Main; thence on Main to Court street; thence on Court to Walnut street; thence on Walnut to Fifth street, using the Cincinnati Street Railway track from Ninth to Fifth; thence on Fifth to the place of beginning, occupying the track of the Street Passenger Railroad Company in common with the said last-mentioned company. This route, after a competitive bidding, was awarded to Porteous B. Roberts, and by sundry mesne conveyances it came to be owned by Smith, Hill, and Doherty, who, in January, 1887, made a perpetual lease of it to the Cincinnati Inclined Plane Railway Company. This lease also contained an option to purchase, which was executed September 21, 1889, whereby this route was absolutely conveyed to the company. Route No. 8 came to be owned by the same persons who owned the inclined plane railway, about the time the inclined plane was built. It was connected at Liberty street with the road built from the foot of the incline, from Mulberry to Liberty, but instead of going west on Liberty to Walnut, continued on Main, south to Court; thence west on Court to Walnut, south to Fifth street,

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east to Main street, and north along Main street to Court. Before the inclined plane was built, "Route No. 8" went around the hill and came into the line covered by the grant under the ordinance of 1875, and was relied upon only as giving a right to the inclined plane company to maintain a second track upon one of the streets in Mt. Auburn, the other track being held under the ordinance of 1875. The result of this combination between the inclined plane ownership and the ownership of route No. 8 was that the grant under the ordinance of October, 1871, has never been used so far as it embraces an easement from Main street on Liberty street to Walnut, and along Walnut to Court. In 1889, the Cincinnati Inclined Plane Railway Company, having, under proceedings heretofore mentioned, obtained authority to extend its line to Glendale, did extend its line of road from the Zoological Garden about five miles along the Carthage pike, by grants emanating from the proper county authorities, to the village of Glendale, in Hamilton county. It thus appears that, prior to March 30, 1877, this company, under the ordinances of 1871 and 1875, and through its lease of "Route No. 8," was owning and operating a through line from Fifth and Walnut streets to the corporation line. We have referred to this in order that we may have in mind the extent and duration of its street grants at the date of the passage of the act of March 30, 1877. That act was as follows:

Street Grants—Construction of Statute.

"Section 1. Be it enacted by the general assembly of the state of Ohio, that any inclined plane railway or railroad company heretofore or that may hereafter [be] organized under the act of May 1, A. D. 1852, entitled 'An act to provide for the creation and regulation of incorporated companies in the state of Ohio,' shall have power to hold, lease, or purchase, and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane; provided, that no other

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motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the board of public works in any city having such a board, and the common council or the public authority or company having charge or owning any other highway in which such street railroad may be laid ; and provided, that no inclined plane railway or railroad company shall construct any track or tracks in any street or highway without first obtaining the written consent of a majority of the property holders on the line of such proposed track or tracks, represented by the feet front of lots abutting on the street or highway along which such track or tracks are proposed to be constructed."

The contention of the complainant is that the effect of this act was to extend the terms of all the street grants the mortgagor company then held, and confer upon it a perpetual right to continuously occupy the streets upon which it then had tracks, and any others occupied by the lines of other companies which might be thereafter leased or purchased. The foundation of this argument lies in the fact that in Ohio there is no limitation upon the duration of a corporation, though the legislature may at any time amend the law under which they may be organized or repeal the same, and thereby terminate their existence. The contention is not well founded. Upon this point we find ourselves in agreement with the Ohio state court, which held that :

"The intention of this law was simply to invest inclined plane railway companies with the corporate power to acquire and operate street railroad routes leading to or connected with their inclined plane ; that in the acquirement of such routes such companies stood in the same position as other persons and other street railroad companies, and that when such routes are acquired by such companies they are bound by all the provisions of the original grant by the city, and that none of the provisions of the same are abrogated by such acquirement. 'The terms and conditions,' refer-

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red to in the act of 1877, are the terms and conditions of the act of May 1, 1852 (50 Ohio Laws, p. 274,) relating to steam railways, and under which, as we have seen, the defendant was incorporated."

The argument that, because the state had imposed no limitation upon the duration of the corporate franchises of this company, therefore the term for which it held its street grants was likewise intended to be unlimited, is illogical. It loses sight of the distinction between those franchises conferred by the state and obtained by organization under the state law and those property or contractual franchises not granted by the state, and not inherent in the corporation as such, but which come from the local authority having the right to grant the right to occupy a public highway. We do not mean to intimate that the municipal or local authority is the only source from which such an easement could come in Ohio. The legislative history of the state is such, however, as to indicate that the settled public policy of the state is not to confer such easements, but to refer all such companies to the municipality upon whose streets or highways they wish to exercise the franchises conferred by the state for the requisite street easements, upon terms and conditions to be agreed upon between such companies and the local government. When, therefore, we come to construe an Ohio statute providing for the organization of either ordinary railway or street-car companies, we may well do so with the expectation that this well-settled policy has not been departed from, and that the state has stopped with the grant of the usual and necessary corporate franchises proper, by which it has been endowed with power to operate its road for tolls, when it shall have acquired from the local authority the equally essential right of occupying with its tracks the particular streets upon which it proposes to conduct its business. That the state did not undertake, in the general incorporation act of May 1, 1852, to confer upon any of the class of corporations therein provided for the power to enter upon and occupy with its tracks the public streets of any

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city or village, or the public highway of any township or county, before obtaining the consent of the local authority concerned, is too clear for discussion. Section 12 of that act expressly provided how such street or highway rights might be obtained, that section being in these words :

"Sec. 12. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way, or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied ; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purpose of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of this act."

The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant. In *Detroit Citizens' St. R. Co. v. City of Detroit*, cited heretofore, we had occasion to construe these words " terms and conditions," and held that, where the local government has or is given power to consent to the occupation of the public streets by such corporations, upon terms and conditions to be agreed upon, the power

Right of Local
Authority to Limit
Duration of Street
Grant.

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to act was an unlimited power, and said that, unless some limitation was to be found in other provisions of law or implied from other considerations peculiar to the law of Michigan, the time for which such grant might be made was a matter wholly within the discretion of the local government, as much as any other term or condition of the grant. In that case a grant of a street easement for a term in excess of the life of the corporation was sustained, against the argument that there was an implied limitation making it requisite that the term should conform to the life of the corporation. The limitations contained in the ordinance of June 16, 1871, granting permission to occupy a part of Locust street, and to cross Miami, Baltimore, and Dorsey streets, are unquestionably valid and obligatory. The limitation upon the duration of the grant was just as much within the power of the city to impose as any other term or condition mentioned within the contract. The fact that the corporate life of the corporation accepting the grant was for a term unlimited in no way abridged its capacity to accept a street grant for a shorter term. Neither would the expiration of such a street grant determine the existence of corporate life or corporate powers. It might not be in a position to exercise the valuable and important franchises of operating a street railway, but its power to do so when it could again acquire the requisite street easement would be unaffected. The case would not be different if it had located its tracks upon private property. If it owned the property in fee, its occupancy and use for corporate purposes might be commensurate with its corporate existence. But, if it acquired a less interest than the fee, it might be ejected therefrom upon the expiration of its term, though its corporate life and power would continue to exist and become again efficient when a new location should be acquired. It follows that this company held the right to maintain and operate its inclined plane railroad just so long as it had the right to occupy the place upon which its tracks were located. As to a

Duration of Corporation to Accept Limited Grant. Capacity of Corporation to Accept Limited Grant.

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part of its railroad, its right of occupancy was unlimited, because it owned the fee in the property upon which its tracks were fixed. As to so much of its railroad as occupied Locust street, or any of the streets over which its track had been constructed, its right to maintain and operate its railroad over or upon public streets depended upon the duration of its grant from the city. That grant, so far as it was dependent upon the ordinance of June, 1871, has expired, and it has no legal right to continue upon those streets, unless its grant is extended as a consequence of the act of 1877. That that act does not have any such effect we are entirely satisfied. Any inclined plane railway or railroad company therefore organized, or which might thereafter be organized, under the act of May 1, 1852, was given power to "hold," maintain, and operate "such portion of any street railroad leading to or connected with its inclined plane, as may be necessary for the dispatch of its business," or purchase any such portion of a street railroad. If, before, its power to own, maintain, and operate such a street railway in connection with its incline under its charter powers was doubtful, its corporate powers were by this act enlarged, and that which before may have been in excess of its powers or of doubtful authority became lawful and valid. The legislature was not dealing at all with the subject of the term or duration of the street rights of such companies, but was dealing with the question of the corporate capacity of a corporation organized under the steam or commercial railway act to maintain and operate an ordinary street railway. The terms and conditions by which it might enter upon and occupy the streets of the city with its inclined plane, or as an ordinary commercial railroad, had been covered by the twelfth section of the act under which these inclined road companies had been organized. That section had referred such corporations to the local authority to obtain the requisite grant, and had authorized the latter to define the terms and conditions upon which such right of occupancy might be permitted. The terms and conditions upon which the Cincinnati Inclined

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Plane Railway Company held and operated its inclined plane proper, if we apply these words to its right of occupancy of the place upon which that structure stood, were not identical, for, as we have seen, it owned in fee in part, and a term of 20 years limited its occupancy as to the rest. It would be absurd, as observed by JUDGE SMITH in delivering the opinion of the state court, to apply these words as a limitation upon its right to hold other parts of its line then owned, or which might thereafter be acquired by lease or purchase, to the terms and conditions under which it occupied Locust street and crossed the other streets named in the ordinance of June, 1871 ; for one of the conditions imposed by that ordinance compelled it to support its track upon abutments or piers, resting in the streets crossed. So such a construction would operate to shorten nearly every grant then owned or subsequently acquired by that company. It would be equally absurd to construe the clause of the act providing that such companies should hold such portions of the street railroads then operated by them perpetually, and without regard to the duration of the street grants under which such railroads occupied with their rails the public streets of the municipality within which they were situated. Nothing in the act indicates an intention to extend its rights of occupancy beyond the contracts under which they were held, or to alter the conditions of section 12 of the act amended. As we read the act, the provision that such companies might hold, lease, or purchase. "upon the same terms and conditions on which it holds, maintains, and operates its inclined plane," has no reference to the mere structure constituting an inclined plane, nor to the special terms and conditions upon which any such company had been permitted to occupy the streets upon which such a railroad had been placed, but refers to the general provisions and conditions of the act of 1852, touching the strictly corporate franchises conferred by that act and the mode prescribed by section 12 thereof, by which such companies might acquire the necessary street grants for the exercise of the proper and profit-

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able functions of a railroad company. The provision in no way enlarged the scope or duration of grants then held, and permitted all such companies to thereafter acquire by lease or purchase other portions of street railways in the manner and subject to the same restrictions prescribed by the act of 1852. We are, therefore, of opinion that this act did not extend the duration or alter the terms or conditions upon which that company then held any street grant. This disposes of the grants of June, 1871, and October, 1864. Both of these grants contained a limitation of 20 years, which has long since expired. Neither has been extended by the act of 1877, and the mortgagor company has no longer a right to maintain its tracks upon the streets covered by those grants, unless the city has estopped itself by conduct to be hereafter considered.

This brings us to a consideration of the grants embodied in the ordinances of December, 1871, and October, 27, 1875. The first contains no time limitations whatever. The second was granted for a period of 30 years, commencing at date of grant. Neither of these grants has, therefore, expired by limitation. The Ohio court was of opinion that neither grant was valid, upon the ground that the city had no power to extend the tracks of an inclined plane company, organized as a steam railway, along the streets of a city to be operated as a street railroad. The opinion of the superior court of Cincinnati, adopted as the opinion of the Ohio supreme court upon this point, was as follows :

“ The ordinance under which this grant was made designated it as an extension, and treats such an extension as a street railroad, which it was, in fact. But, while the city authorities are undoubtedly invested with power to extend a street-railroad route after its original establishment (sections 2501-2505, 3443, Rev. St.), it is also undoubtedly true that it only has power to extend a street railroad as a street railroad, and that it has no power to extend a steam railroad and call it a street railroad, and invest it with all the powers of a street railroad. To have a legal extension of a street railroad

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there must be a street railroad to extend. A steam railroad may be extended as a steam railroad, but it cannot be extended as a street railroad any more than a street railroad can be extended as a steam railroad. The extension must be of the same legal nature as that which it extends. For the same reason, we are of the opinion that the ordinance of 1875 which undertook to extend the inclined plane railway as a street railway north of the place, was also void." 30 Wkly. L. Bul. 326.

In the view we have taken of the effect of the act of 1877 invalidating the grants under which that company was occupying the streets embraced within these ordinances, it is unnecessary to determine whether those ordinances were invalid. There are considerations which tend to a contrary view. The situation of such inclined plane railway companies was peculiar. There was no specifically prescribed form under the general incorporation act under which they could organize. The motive power intended to be used was steam, so far as the operation of the inclined plane proper was concerned. None other, under the then state of the art, was sufficiently powerful or reliable. To simply carry passengers from the base or top of the plateau, and leave them, was to accomplish but a small part of the difficulty which they set about to remove. The passengers must be brought to the incline and distributed, either in the city or its suburbs. Thus, though the inclined plane was the central part of the scheme, the railroad at the top and bottom of the inclined plane were necessary adjuncts of the business. The city willingly granted permission to extend its railroad at both ends of the incline, but did this only on condition that upon such extension no other [power should be used than animal, and also limited its tolls for passengers. The state court seems to have been of opinion that, while the city had the power to authorize such extensions of a railroad line, either commercial or street, it could not extend one and call it another. It seems somewhat difficult to see why a change in motive power

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should be *ultra vires*. There was no condition in the Ohio corporation law that a commercial railroad should use steam, or only steam. No reason occurs why an ordinary railroad desiring to pass its cars through the streets of a city might not be required, as a condition of street occupancy, to use animal power alone, or why, as an added condition, it might not be required to carry passengers in such cases at a low rate. It is hard to draw any hard and fast line between what is called an "ordinary commercial railroad" and a "street railroad" proper, if any such line is to be drawn, neither the motive power nor the rate of tolls will answer. The only one which seems reasonable is found in the difference between the business each is intended to do. Whether there is any such constitutional difference between them as to prevent either from doing both kinds of business, under a general carrier charter, we need not now determine. If we accept the construction placed by the Ohio court upon the general and special powers of the city of Cincinnati, we are still confronted with the question of the effect of the act of 1877, in confirming or validating the defective grants theretofore made by the city and accepted by that company.

This is a question *res integra*. The opinion of the state court does not directly deal with this as a distinct question. It is true that that court did hold that the ordinances of 1871 and October, 1875, by which the inclined plane railroad company had been permitted to extend its railroad from the base of its incline to the heart of the city, at Walnut and Fifth streets, and from the top of the incline to the corporation line at the Zoological Garden, were invalid, on the ground heretofore stated, but the court does not consider the curative effects of the act of 1877. This question is one upon which the Ohio court has expressed no definite opinion, and if the decree is of no effect, as *res adjudicata*, this court is clearly at liberty to pronounce an independent judgment as to the legal effect of the act in question in validating the then existing contracts between the city and the Cincinnati Inclined Plane Railroad Company.

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and this independently of the ground stated in a former part of this opinion. The subject of the act was the powers of inclined railroad companies, organized under the so-called steam railroad act of 1852. The object, from its general tenor, was to legalize, if illegal, the business they were doing as street railroad companies. The clear purpose was to remove any difficulties which stood in their way by reason of their peculiar business and their organization under the commercial railroad act. We are justified in assuming that it was known to the legislature that such companies were more nearly street railroad companies than ordinary commercial railroads, and that they were engaged in doing business peculiar to street railroads. Now, to construe this act as wholly prospective would lead to most absurd consequences. To give them power to lease or purchase portions of street railroads connecting with their inclined plane, and no authority to hold, operate, and maintain such as they already had, would be a situation so absurd as to require us to look for some more reasonable meaning. Take the company whose street franchises are involved. It had been for years operating a long line of street railway in connection with its inclined plane. To give it power to acquire by lease or purchase such a railroad, without power to hold that which it had, would be to strip it of its property rights and compel it to again lease or purchase that which was already its own. That no such curious result is to be found in this act is made clear, if we bear in mind the purpose of this act and the defects of power intended to be remedied thereby. We accordingly find that the act is not limited to a grant of power to acquire in the future such railroad, but confers power "to hold, lease, or purchase, and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business." This power to hold, maintain, and operate, if to be given any effect, must operate by way of validating the grants or contracts under which such companies then held, maintained, and operated

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such railroads as conform to the description mentioned.

Whatever doubt may exist as to the sufficiency of the corporate powers of the Cincinnati Inclined Plane Railway Company, prior to the act of 1877, to hold, maintain, and operate a street railroad in connection with its inclined plane, or as to the power of the city of Cincinnati to consent to the occupancy of its streets, that defect in power was removed by the act of 1877. In 1885, the city of Cincinnati, by proper ordinance, permitted this very company to use either a cable, compressed air, or electricity as a motive power in the operation of the street-car lines covered by these two grants and that known as "Route No. 8." The change was subsequently made from horse power to electricity. Its system of electricity interfered with the operation of a telephone line, whose wires were strung along the same streets. The latter undertook to enjoin the railroad from the use of the single-trolley electrical system as a motive power. The power of the company to hold, maintain, and operate a street-car line, and the power of the city to authorize it to change from horse power to electricity, was challenged by the telephone company. The superior court of Cincinnati, in an opinion found in 23 Wkly. Law Bul. 165, held that, under the act of 1877, this line of railroad from the foot of the incline down to the city, and from the top of the hill to the suburbs, were lines connected with the incline, and were necessary incidents in getting passengers to the place of ascent and descent, and that the change from animal power to electricity was authorized by that act, the board of public works having assented. This conclusion as to the validity of the corporate power of that company to maintain and operate this street railroad with electricity was affirmed upon an appeal to the supreme court, though the judgment was reversed upon another question in the case. City & Suburban Tel. Assoc. v. Cincinnati Inclined Plane R. Co., 23 Wkly. L. Bul. 165; 48 Ohio St. 390. Whether the act was passed because the corporate power of such companies did not authorize the operation of a street

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railroad under a steam railroad charter, or to remove a mere doubt, the result is the same. If the charter power was insufficient to enable such companies to maintain and operate street railroads, or to accept a street grant for such a purpose, or if the power of the city of Cincinnati was not sufficient to enable it to authorize a steam railroad company to occupy its streets with a street railroad, the clear purpose and effect of the act of 1877 was to validate that which had been done in respect to such companies. The power to "hold," maintain, and operate "portions" of such street railroads then held by such companies is as clearly granted as is the power to acquire thereafter, by lease or purchase, such parts of other lines as may be necessary for the convenient dispatch of business. Cincinnati & S. G. A. St. R. Co. *v.* Cumminsville, 14 Ohio St. 523, 538.

The suggestion that this act of 1877 was itself void, as a special act, not having uniform operation, or as a special act conferring corporate powers, both of which kinds of legislation are obnoxious Special Act. to section 26, art. 2, or section 1, art. 13, of the Ohio constitution, has not seriously impressed us. The point was not made by the eminent counsel who argued the case of City and Suburban Tel. Assoc. *v.* Cincinnati Inclined Plane R. Co., 23 Wkly. L. Bul. 165, though the legal organization of the railway company and its right to maintain and operate a street railroad was bitterly controverted. Both the superior court of Cincinnati and the supreme court held that under that act the railway company was lawfully using electricity as a motive power in the operation of its railroad. Neither was any such constitutional objection raised or considered in the subsequent case of City of Cincinnati *v.* Cincinnati Inclined Plane R. Co. The act is not special in form. It applies to all inclined plane railroad companies which had been organized under the act of May 1, 1852, and operates to confirm all such companies in their ownership and operation of street railroads, so far as such maintenance and operation had been invalid

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by defect of power. How many companies had been so organized, or were engaged in operating street-car lines, we have no means of knowing. Whether few or many, the classification was not arbitrary, but general and natural. It is difficult to conceive that the legislative power of Ohio is so cramped as to be unable, through the form of a general statute, to extend relief and remove doubts as to the legal organization of so useful a class of corporations as that described in this act. We are not convinced as to the unconstitutionality, and shall give the act the benefit of any doubt.

The grant under the ordinance of December, 1871, was unlimited as to time. There was at that time no statutory restriction upon the power of a city to grant an unlimited street easement to either a railroad or street-car company, having the requisite franchises from the state. The act limiting the power of a city to a term not exceeding 25 years was not passed until May 14, 1878. Neither do we think there was any implied restriction upon the power of the city, springing from reasons of public policy. The corporation to which this grant was made was perpetual, and we see no sufficient reason which would justify the court in holding that it was not within the discretion of the municipal government to grant to such a company an unlimited easement upon the streets. But only a fragment of this grant has ever been actually used,—that part of the line at the base of the inclined plane south upon Main to Liberty. The rest of the line authorized by this ordinance has never been constructed. The concurrent ownership of the grant under this ordinance and the grant under "Route 8," by the same persons, accounts for this disuse of the remainder of the line permitted by this ordinance. The route actually occupied by this company from Main and Liberty was that designated as "Route 8," namely, south on Main to Court street; west on Court to Walnut street; south on Walnut to Fifth street; east on Fifth to Main street; thence north on Main to Court street. The grant under the ordinance in question was only identi-

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cal with that embraced in "Route 8" from Court on Walnut to Fifth, thence on Fifth east to Main. That part of the grant beginning at Liberty and Main, thence west on Liberty to Walnut, thence south on Walnut to Court, seems never to have been occupied by this company under any franchise. The deliberate selection of "Route 8" as a more desirable means of reaching Fifth street, and the disuse for a period of over 20 years of substantially all of the grant under this ordinance of December, 1871, must, in the absence of countervailing circumstances, be regarded as an abandonment of this grant except in so far as it has been actually used between the base of the inclined plane and Liberty street. Abandonment by non-user of grants of this character may be the more readily presumed, the grant being of a public easement, and for the purpose of providing for and promoting the public good. *Henderson v. Railway Co.*, 21 Fed. Rep. 358, 20 Am. & Eng. R. Cas. 542. There are no circumstances in this case tending to show that this company intended at any time to avail itself of the privileges of this grant. There are no circumstances tending to make the intention of this company by this long disuse doubtful, nor any facts which tend to prove an extension of the time within which it might have appropriated and used the right of way herein granted, such as appear in the case of *Citizens' St. R. Co. v. City of Memphis*, 53 Fed. Rep. 715, 56 Am. & Eng. R. Cas. 385. We think, however, that the occupancy and continued use of the fragment of this grant was an effective acceptance of that part of the grant from the foot of the incline at Mulberry street to the connection at Liberty street with "Route 8." Under the ordinance of October, 1875, there was granted to this company a right of way upon certain streets for a period of 30 years. This grant authorized the construction and maintenance of a double track from Locust street, commencing at the top of the inclined plane proper; thence north to Mason; thence, on Mason, east to Auburn street; thence, on Auburn,

Presumption of
Abandonment -
Non-user.

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by a single track, to Vine; thence, on Vine, by a double track, to the corporation line at the Zoological Garden. This grant has not expired, and the streets mentioned therein have been occupied and a line continuously operated thereunder. A double track has been maintained on Auburn street between Mason and Vine,—one under this grant, and the other under the grant of "Route 8." The permission to maintain this second track upon Auburn street has, as we have heretofore stated, long since expired by the limitation contained in the ordinance of 1864.

It has been urged that the expenditure of the great sum of money necessary to change the motive power from horse to electricity, a change made under resolutions of the board of public works after the expiration of the grant for "Route No. 8," and the grant of June, 1871, estops the city from denying the rightful occupation of the streets by the company, and operates as an extension of the expired grants. The resolutions referred to simply consented to the substitution of electricity for animal power. The consent was not given by ordinance, and was not intended to extend any franchise. It was a consent granted under the act of March 30, 1877, which provided that no other motive power should be used upon any street railroad held, or acquired thereafter, by inclined plane railroad companies, without the consent of the board of public works in any city having such a board. The supreme court of Ohio held that the Cincinnati Inclined Plane Railroad Company was legally using electricity as a motive power; the board of public affairs, the legal successors of the board of public works, being empowered to permit such change by act of March 30, 1877. *Cincinnati Inclined Plane R. Co. v. Telegraph Assoc.*, 48 Ohio St. 420-422. Under the statutory law of Ohio, no street franchise of such a company could have been granted, renewed, or extended, at the date of the resolution passed by the Cincinnati board of public works, or that passed by its successor, the board of public affairs, except by an or-

Change of Motive
Power—Expense—
Estoppel.

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ordinance passed upon the recommendation of the board of public affairs. Rev. St. Ohio, §§ 1665, 1666, 2227, 2501, 2502, 3438, 3443. The city was but a trustee, acting for the public in respect of the granting of street easements. The mode in which it might grant such street rights was specifically prescribed by law. It was not, therefore, competent for the board of public affairs to extend such an easement without the concurrent action of the legislative branch of the government, and the mere non-action of the municipal government after the expiration of a part of the street grants under which the company was occupying the streets neither creates an estoppel nor operates as an extension of grants which could only be extended by ordinance duly enacted. We do not undertake to say that a municipal government may not, under some circumstances, estop itself from asserting a legal right or denying a liability. Dill. Mun. Corp. §§ 459, 675. This question has been considered, and the authorities cited, by Judge Taft in *City of Detroit v. Detroit City R. Co.*, 60 Fed. Rep. 161. But the facts in this case do not, in our judgment, establish an estoppel, and are wholly insufficient to establish a legal extension of either of the expired grants.

What remedy can be afforded the complainant to protect it and its interests against the destruction of its property rights, in so far as those rights will be affected by the removal from the streets of the rails, poles, and other equipment now occupying streets covered by the grant of 1875, and that fragment occupied under the grant of December, 1871? By abandonment of the grant of December, 1871, and by expiration of the grant known as "Route No. 8," and by expiration of the grant of June, 1871, its occupation of many of the streets, from which the city threatens to eject it, is unlawful, and as to those streets complainant must submit. As to the line from the top of its inclined plane, save one track on Auburn street, its rights have not expired, and that track should not be disturbed by the city. Still, it is said that the state court adjudged the ordinances of 1875 and of December, 1871, to be void,

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and has decided that the city is entitled to remove the rails and other equipment occupying the streets embraced in those ordinances, and stop the operation of its railroad on said streets, and that this court, by reason of section 720, Rev. St., is powerless to prevent the execution of that decree, although this complainant has a large property interest to be affected thereby, and is not bound by that decree. When this bill was filed the state court had not enjoined the mortgagor company from operating its entire line. The issuance of any writ of injunction, or of any writ to dispossess the company, stood suspended until further order of the court. It was not, therefore, sought to enjoin the issuance or execution of any writ under the decree of the state court, nor could such an injunction have been properly allowed. Neither would it have been proper, under section 720, Rev. St., to have enjoined the city from applying for any writ which the state court might lawfully issue, or to have prevented, by injunction, the execution of such writ, although its execution might have been very destructive to the interests of this complainant. The remedy by injunction against proceedings in a state court is not permitted under the act of congress. Complainant would be driven to rely upon his legal remedy for damages against the city, its agents and attorneys, for any injury done it by the destruction of its rights as a mortgagee not bound by the judgment of the state court. Under the bill as framed, and under the facts as they then appeared, this court could only declare the legal rights of complainant, and enjoin the city from itself undertaking to dispossess the mortgagor from that part of its line occupied under valid and unexpired grants. A litigant may not execute his own decree. If the adversary will not quietly surrender the subject of litigation, resort must be had to the court in which the right was declared for the proper legal writ, and for its regular execution. It is therefore proper, under the allegations of the bill as to the purposes of the defendant, to enjoin it from taking into its own hands the enforcement of the decree of the state court.

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Before this cause was finally heard below, and before any process had issued under the state court decree, the complainant herein filed another bill in the same circuit court of the United States, for the purpose of foreclosing the mortgage, under which it was the trustee, a default in interest having occurred. Under the latter bill a receiver was appointed, and placed in possession of the entire railroad, and has ever since been operating the same under the orders of the circuit court. That bill was pending when this case was appealed, and a copy of the Record as Evidence. record in that cause was offered as evidence in this cause, after the case had been argued, but before it was decided. This, upon objection, was ruled out, but by bill of exceptions has been included in the record before us. We see no reason why the learned district judge might not have received this record, not as evidence affecting this case, but as matter proper for consideration when he should come to consider to what extent he had the power to grant relief. Having the actual possession and custody of the property involved, that possession should not be disturbed, except upon application to the court. The mortgagor is no longer in possession, and is not engaged in the operation of the railroad whose rights are involved. The possession of the receiver is the possession of the court, and the property is in *custodia legis*, and held and operated for the benefit of all having an interest or right therein. If the occupation of any of the streets of Cincinnati is no longer lawful, the court should be quick in directing its receiver to respect the rights of the city, and to desist from the operation of such parts of the road as are upon streets where the easement has expired, unless the consent of the city for such further operation is first obtained. The federal court must not suffer itself to be used as a means of obstructing the just and legal rights of the city, or less prompt in courteous regard for the judgment of the state court, than the absolute necessities of the case demand, in order to prevent injustice to this complainant.

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Before the federal court took possession of this property, and placed it in the possession of a receiver, the city might have applied to the state court for all proper writs. It could not properly be restrained from making such application, nor would the federal court have restrained the execution of any writ so issued. The case is now different. The federal court has first obtained possession, and any application to dispossess the receiver should be made to the court appointing him. In this way, and in this way only, can unseemly conflicts of jurisdiction between courts co-ordinate in power and authority be avoided. This case and the foreclosure suit were pending in the same court. We see no difficulty in the circuit court taking judicial notice of the pendency of another suit in the same court under which it had taken possession of the subject-matter of this suit. With such judicial cognizance, the question of remedy is clear. The court might have directed the filing of an amended and supplemental bill in this case, setting up the pendency of the other suit, and the action had therein, or ordered this to be filed as a petition in the other cause, with leave to bring the city of Cincinnati in as a party claiming rights in the mortgaged property. That this or such other course may be taken as the complainant may be advised, the decree will be reversed and remanded, with leave to amend in the manner suggested, and for such further orders and decrees not inconsistent with the views here expressed.

Dispossession of
Federal Receiver—
State Court.

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NORTHERN CENT. R. Co.

v.

HARRISBURG & M. ELECTRIC R. Co. *et al.*

(177 Pa. St. 142.)

Right of Street Railway to Cross Railroad—Construction of Charter.*—There were provisions in the charter of a street railway company that "the act of the company authorizing any extension or branch shall distinctly name the streets and highways on which said extension or branch is to be laid or constructed," and that "no extension or branch shall be constructed upon any street or highway upon which a track is laid or authorized under any existing charter, except as hereinafter provided," and that it was authorized "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise. *Held*, that such provisions did not authorize the company to construct and operate its road across the line of a steam railroad company without the consent of, and against the protest of such railroad company at a point where the roadway of the railroad company was not crossed by a public highway.

Property of Railway Company in Right of Way.—The property of a railroad company in its right of way is such as to give it standing in court to resist a threatened invasion of its rights by the building of an overhead bridge by a street railway company over the right of way for the running of the street cars of such street railway company.

Case at Bar.—A street railway company threatened to build an overhead bridge for the operation of its cars over a strip of property held in fee by a railway company, and over the right of way of such company, without authority under its charter, and without the consent of the railway company. *Held*, that the railway company was entitled to a perpetual injunction against the construction of such bridge.

APPEAL from Cumberland county court of common pleas. *Reversed* as to the first-named defendant.

Edw. B. Watts, W. F. Sadler, and John Hays, for appellant.

A. G. Miller and J. W. Wetzel, for appellees.

STERRETT, C. J. It is unnecessary to consider all the questions presented by this record. Such of them

*See note at end of case.

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as are worthy of notice have been referred to, at least briefly, by the learned president of the common pleas in his opinion, findings of fact, and conclusions of law sent up with the record. The general and controlling question, however, is whether a company chartered under the street-railway act of May 14, 1889 (P. L. 211), has the right to construct, maintain, and operate its road across the lines of a steam-railroad company, without the consent and against the protest of the latter, at a point where its roadway is not crossed by a public highway. The answer to this question must, of course, be sought for in the expressly granted or necessarily implied powers and authority with which the street-railway company has been invested by the law under which it was created, and subject to which it continues to exist. If the right referred to cannot be found therein, it necessarily follows that the question must be answered in the negative. Section 1 of the act of 1889 provides "that any number of persons, not less than five, may form a company for the purpose of constructing, maintaining, and operating a street railway on any street or highway upon which no track is laid, or authorized to be laid or to be extended under any existing charter, with the privilege of so much of any street, used or authorized to be used under any existing charter, as is hereinafter provided, for public use in the conveyance of passengers, by any power other than by locomotive; and for that purpose may make and sign articles of association in which shall be stated * * * the streets and highways upon which the said railway is to be laid and constructed," etc. Section 4, authorizing extensions and branches, declares that "the act of the company authorizing any extension or branch shall distinctly name the street and highways on which said extension or branch is to be laid or constructed." It also provides that "no extension or branch shall be constructed on any street or highway upon which a track is laid or authorized under any existing charter, except as hereinafter pro-

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vided." Section 14 authorizes the use of "such portion of the track of any other company, already laid down, as may be necessary to construct a circuit upon its own road at the end thereof." The length of track to be thus used "only with the consent of the local authorities of the city, borough or township, in no event, shall exceed five hundred feet of single track." It also prescribes the mode in which compensation for such use shall be made, etc. The next section declares: "No street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough or township without the consent of the local authorities thereof, nor shall any street railway be incorporated hereunder which shall not have a continuous route from the beginning to the end, forming a complete circuit with its own track, excepting the five hundred feet to be used under section fourteen." Section 17 authorizes the occupation and use of turnpikes, not exceeding sufficient width for two tracks, and requires that compensation for such use shall be first made to the owner or owners of such turnpike or turnpikes, in the mode prescribed in section 14, aforesaid. With the exception of above-mentioned restricted and qualified rights to use a small section of another company's track in forming a circuit, and to occupy and use longitudinal strips of turnpikes, etc., street-railway companies chartered under said act are certainly not, in express terms, invested with any other power or authority in the nature of eminent domain. Indeed, the specific grant of these qualified rights is strongly indicative of legislative intention to withhold from such companies every other power of eminent domain. This conclusion is further fortified by the provisions intended to restrict them to established streets and highways as the location of their main lines, extensions, and branches. As we have seen, their right to construct, maintain, and operate street railways is specifically limited to existing streets and highways. The names of the streets and highways selected by them must be stated in each company's articles of association.

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In the recorded action of the company exercising the branching power, etc., authorized by the act, it must also "distinctly name the streets and highways on which said extension or branch is to be laid or constructed." In brief, in the selection or adoption of the route, either of their main line or of any extension or branch thereof, they are expressly confined to established streets or other avenues in cities and boroughs, and to public highways in townships, subject to such further restrictions, even as to them, as are specified in the act. Outside of and beyond the restricted power and authority as to selection and adoption of a route, etc., thus granted, they are not invested with any other authority in that regard except such as may be necessarily implied. Without ignoring the well-settled rules applicable to the construction of charters, it is impossible to reach any other conclusion than that the legislature, in this carefully drawn and well-guarded act, intended to withhold from companies chartered thereunder everything in the nature of a roving commission under which they might assert the right to locate, construct, and operate street railroads wherever they pleased. It was successfully contended in the court below that the authority given in section 18 of the act "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise," is general in its application, and confers an unqualified right to cross a steam railroad anywhere, without regard to whether there is an established street or highway crossing at the same point or not. This is a grave mistake. As we have seen, location, construction, and operation of street railways are authorized only on established streets and highways. Section 18 is evidently predicated of that fact, and hence the authority therein granted is necessarily applicable only to crossings at points where the railroad is crossed by a street or highway. In other words, it refers only to crossing at a point where the street or highway on which the street railway is located crosses the steam railroad. To hold otherwise would not only be contrary to the manifest

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intention of the legislature, but it would involve the constitutionality of the eighteenth section.

As to the property on which the alleged trespass was threatened, the learned trial judge found that "at the place of crossing plaintiff has a right of way sixty feet in width, and an adjoining strip of land twenty feet wide, which was acquired by deed"; and in sustaining plaintiff's eighteenth and nineteenth exceptions to his previous rulings he further found that said 20 feet wide strip of land is owned by it in fee, that prior to filing the bill defendant company attempted to cross plaintiff's land and right of way at the point in question, and that plaintiff had reason to apprehend that such attempt was imminent, etc.; but, in view of the facts, as he found them, he held as matter of law that plaintiff's right of way and ownership in fee of said strip of land were immaterial; that the right to cross plaintiff's railroad, etc., at an elevation of about 22 feet above the surface of its tracks was conferred upon the Harrisburg & Mechanicsburg Electric Railway Company by section 18 of the act, and then said: "The long, narrow piece of land referred to, which is held in fee, is essentially part and parcel of the railroad, just as much so as the easement which it adjoins, and the right to cross it is as clearly given as is the right to cross the easement." For reasons already suggested, we think he was clearly wrong in this. Aside from the ownership in fee of the 20 feet wide strip, the plaintiff has a substantial property interest in its right of way which the defendant is bound to respect. While that interest cannot be called a fee, it is a species of title that has some of the incidents

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of an estate in land. As was well said by our Brother MITCHELL in *Railroad Co. v. Reading Paper Mills*, 149 Pa. St. 18: "Such title is sometimes called 'an easement,' but it is a right to exclusive possession; to fence in, to build over, the whole surface; to raise and maintain any appropriate superstructure, including necessary foundations; and to deal with it, within the limits of railroad uses, as absolutely and as uncondi-

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tionally as an owner in fee. There was no such easement at common law. * * * It would seem to be rather a fee in the surface, and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes. But, whatever it may be called, it is, in substance, an interest in the land special and exclusive in its nature, and which may be the subject of special injury, * * * and, therefore, within the rule which governs the application of equitable relief."

There is also manifest error in the tenth finding of fact, viz.: "So far as the evidence has disclosed, the building of defendant's railway and the running of cars thereon will not injure or affect the operation of plaintiff's railroad, or inflict upon plaintiff any actual damage. There will be no increase of danger from accident or other cause." Aside from the unauthorized occupation of plaintiff's property by spanning the same with an overhead bridge or viaduct, 100 feet or more in length and about 22 feet above its tracks, at a point where there has never been an overhead or grade crossing of any kind, it is impossible to reach the conclusion that such a superstructure, with electric cars running thereon at frequent intervals, will not result in a greater or less increase of danger to plaintiff company, its patrons, and employees. To what extent the danger from accident or other cause would be increased would, of course, depend very largely on the degree of care and skill exercised in the construction and maintenance of the bridge and in the operation of the street railway thereon; but that, under the most favorable circumstances, there would be an appreciable increase of danger, no one can doubt.

It follows from what has been said that plaintiff had standing to resist the threatened invasion of its rights by the Harrisburg & Mechanicsburg Electric Railway Company, one of the defendants, and, upon the facts shown by the pleadings and proofs, it was entitled to the relief prayed for. The decree dismissing the bill is accordingly reversed, and

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the perpetual injunction specially prayed for is now granted against the Harrisburg & Mechanicsburg Railway Company, with costs to be paid by said company; and as to the other defendant the bill is dismissed.

NOTES.

Right to Cross Track of Another Company.—But a company cannot object to the cars of another company crossing its tracks where the two highways cross. Brooklyn Cent., etc., R. Co. v. Brooklyn City R. Co., 33 Barb. (N. Y.) 420; New York, etc., R. Co. v. Forty-second St., etc., R. Co., 50 Barb. (N. Y.) 309; Market St. R. Co. v. Central R. Co., 51 Cal. 583. An injunction will not lie to restrain a street railway company from laying a second track across the track of another, it appearing that the latter company has no exclusive right to occupy the street, and there is no allegation or proof that the latter company is insolvent or the injury irreparable. Highland Ave., etc., R. Co. v. Birmingham Union R. Co., 93 Ala. 505; 50 Am. & Eng. R. Cas. 422.

Under the *Pennsylvania* statute (Pub. Laws, p. 211, § 18), a street railway may cross "at grade, diagonally or transversely, any railroad operated by steam or otherwise." An injunction will lie, therefore, to restrain one railroad company from removing and destroying the road of another company laid in conformity to the grade across its roadbed. Buffalo, etc., R. Co. v. DeBois Traction Pass. R. Co. (Pa. 1892), 24 Atl. Rep. 179; Braddock, etc., R. Co. v. Braddock Electric R. Co., 1 Pa. Dist. Rep. 44. And see notes 36 Am. & Eng. R. Cas. 571; 3 *Id.* 522; 14 *Id.* 76, 17 *Id.* 168; 3 Rap. & Mack's Digest 390.

MISSOURI PAC. R. CO.

v.

STATE OF NEBRASKA *ex rel.* BOARD OF
TRANSPORTATION.

(164 U. S. 403.)

Taking of Private Property—Due Process of Law.*—A state board of transportation, by virtue of a statute authorizing it, made an

**Elevators—Taking Property without Due Process of Law.*—In *State v. Chicago, etc. R. Co.*, 36 Minn. 402, a Minnesota statute requiring railroad companies to permit others, on application, to construct and maintain and operate elevators on the land of such company, was held unconstitutional and void in that it made no provision for just compensation. And see generally 4 Rap. & Mack's Digest 540.

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order requiring a railway company to surrender to certain individuals a part of its land for the purpose of building and maintaining an elevator upon it. *Held*, that such order was, in effect, a taking of the private property of the railway company for private use, and was unconstitutional as not being by due process of law, and the judgment of the supreme court of the state awarding a mandamus to compel the company to comply with the order was reversed.

IN ERROR to the supreme court of the state of Nebraska.

This was a writ of error to review a judgment of the supreme court of the state of Nebraska awarding a writ of mandamus to compel the Missouri Pacific Railway Company, a corporation of Nebraska, to comply with an order of the Nebraska state board of transportation which directed the company to grant to John W. Hollenbeck and others the right and privilege of erecting an elevator upon the grounds of the railway company at its station at Elmwood.

By the constitution of Nebraska of 1875, art. 11, § 4, "Railways heretofore constructed or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." And by section 7, "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises."

The state board of transportation was created by the statute of Nebraska of March 31, 1887, c. 60, entitled "An act to regulate railroads, prevent unjust discrimination," etc., which took effect July 1, 1887, and was very similar to the act of congress of February 4, 1887, c. 104, regulating interstate commerce (24 Stat. 279), except in applying only to commerce within the state.

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The material provisions of the Nebraska statute are as follows: Section 1. The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property by railroad, under a common control, management or arrangement for a continuous carriage or shipment from any point in the state of Nebraska to any other point in said state. The term "railroad," as used in this act, shall include the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivery, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Sec. 2. If any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. It shall be unlawful for any common carrier subject to the provisions of this act to make or give any preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic,

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to any prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such contracting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 17. Said board shall have the general supervision of all railroads operated by steam in the state, and shall inquire into any neglect of duty or violation of any of the laws of this state by railroad corporations doing business in this state, or by any officer, agent, or employee of any railroad corporation doing business in this state; and shall, from time to time, carefully examine and inspect the condition of each railroad in this state, and its equipments and manner of the conduct and management of the same, with reference to the public safety, interest and conveniences. It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities or accommodations furnished by any railroad corporation doing business in this state, for the comfort, convenience and accommodation of individuals and the public; or any unjust discrimination against either any person, firm, or corporation, or locality, either in rates, facilities furnished, or otherwise; and whenever, in the judgment of said board, any repairs are necessary upon any portion of the road, or upon any stations, depots, station-houses or ware-houses, or upon any of the rolling stock of any railroad doing business in this state, or additions to, or any changes in its rolling stock, stations, depots, station-houses or warehouses are necessary in order to secure the safety, comfort, accommodation and convenience of the public and individuals, or

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any change in the mode of conducting its business or operating its road is reasonable and expedient in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places, it shall make a finding of the facts, and an order requiring said railroad corporation to make such repairs, improvements, or additions to its rolling stock, road, stations, depots or warehouses, or to make such changes, either in the manner of conducting its business or in the manner of operating its road, as such board shall deem proper, reasonable, and expedient; and said finding shall be entered in a record kept for that purpose, and said board shall cause a copy of the same to be served on said railroad corporation by any sheriff or constable in this state, in the same manner as a summons is required to be served, and shall also transmit to the person, firm, or corporation interested, a copy of the same. Said railroad corporation shall, within ten days after being served with a copy of said finding and order, show cause, if any it has, why it should not comply with said order, by filing with said board an answer, verified in the same manner as pleadings of fact in the district court are required to be verified. If no answer shall be filed as aforesaid, then such finding and order shall be final and conclusive as against said railroad corporation. Upon the filing of any answer, as provided for in this section, the said board shall set a day, not exceeding thirty days from the date of the filing of such answer, for the hearing of the matter, and shall notify said railroad company, or any other person or persons or corporations interested, of the time so fixed, and the place of hearing the same; and shall carefully and fully investigate the matter, and for that purpose may subpoena witnesses, and compel their attendance, and the productions of any books or papers, in the same manner as the courts of law of this state may do. After a full investigation of the matter, said board shall again make a finding of the facts, and make such an order as it may deem just in the premises. If said railroad shall refuse or neglect to

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comply with such order, the board shall order the attorney general or the county attorney of the proper county to institute a suit to compel such railroad company to comply with such order; and it shall be the duty of the attorney general, or the county attorney of the proper county, at the request of the board, or any person interested in any such order or finding, to apply to the supreme court, or to the district court of any county through or into which its line of road may run, in the name of the state and on the relation of said board, for a writ of mandamus to compel such railroad company to comply with such order; and, upon the hearing of any such cause, such finding and order shall be, as against such railroad company, *prima facie* evidence of the reasonableness of such order, and of the necessity of such repairs, changes, additions, or improvements, or other matters in such order required to be done or omitted. Neb. Laws 1887, pp. 541, 542, 555, 558 [Comp. St. 1895, pp. 779, 780, 785, 786].

On October 9, 1889, there was presented to the Nebraska state board of transportation a complaint in these terms:

"The petition and complaint of John W. Hollenbeck, Cyrelus Lemasters, John W. Miller, John Hayes, Charles Hall, and others, trading under the name of the Elmwood Farmers' Alliance, No. 365, of Elmwood, Cass county, Nebraska, respectively represents:

"First. That the petitioners and complainants are now, and have for many years been, extensive raisers of corn, wheat, oats, and other cereals, and that large quantities of said cereals have been marketed in seasons past, and that large quantities are now ready for the markets; that the several farms and leaseholds of the petitioners are situated near Elmwood, in Cass county, Nebraska.

"Second. That the Missouri Pacific Railway Company is a common carrier, engaged in the transportation of passengers and property by railroad under a common control, management, or arrangement for a continuous carriage or shipment through Elmwood aforesaid.

"Third. That the said defendant railroad company is the owner of the right of way and depot grounds bordering the main and side tracks of the defendant company, upon which are located the station houses and other shipping facilities connected with the transportation originating at or destined to Elmwood station aforesaid; that the complainants aforesaid did make a written application to the general manager of the defendant company for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms; that the application aforesaid was refused by the general manager of the defendant company aforesaid.

"Fourth. That the elevators now located on the right of way of the defendants aforesaid at Elmwood station aforesaid are, during certain seasons of the year, wholly insufficient in affording a market for the cereals of the complainants and others desirous of marketing their grain.

"Fifth. That the refusal of the defendant railroad company to lease a location for an elevator as aforesaid is in contravention of the provisions of an act of the legislature entitled 'An act to regulate railroads, prevent unjust discrimination,' etc., approved March 31, 1887, in that:

"(a) The said refusal is an unjust discrimination.

"(b) The said Missouri Pacific Railway Company, by the refusal aforesaid, is subjecting the complainants aforesaid to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other localities.

"(c) The said Missouri Pacific Railway Company, by the refusal aforesaid, is giving an undue and unreasonable preference and advantage to Adams & Gilbert and Eells Bros., owners of the elevators located at Elmwood, on the right of way of the defendant, by permission of the said Missouri Pacific Railway Company.

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"Wherefore the petitioners pray that the defendants may be required to answer the charges herein, and that, after due hearing and investigation, an order be made commanding the defendants to cease and desist from said violations of the act of the legislature entitled 'An act to regulate railroads,' etc., and for such other and further relief as the board of transportation may deem necessary in the premises."

On the same day, the board of transportation issued an order to the railway company to show cause why the prayer of the complaint should not be granted: and on October 19, 1889, the railway company filed an answer, admitting its ownership of the right of way and depot grounds at Elmwood, described in the complaint, and its refusal to allow the petitioners to erect an elevator on the side track there, and that there were two elevators now upon that track, and alleging that those two elevators were sufficient to transact the business at Elmwood, and that there was no room there for another elevator, without purchasing an additional right of way and extending its track, and that this was the only reason for the refusal; and denying all the other allegations of the complaint.

On December 13, 1889, the board of transportation, after a hearing, at which evidence and arguments were submitted on behalf of both parties, made the following findings and order:

"This case and complaint having been heard by the board upon the pleadings, evidence, and argument of counsel, the board finds as follows:

"First. That the defendant has all its side tracks within the limits of its right of way and depot grounds at the said station of Elmwood.

"Second. That there are only two elevators at said station of Elmwood, having the combined capacity of ten thousand bushels, and that said elevators are insufficient to handle the grain shipped at said station, and that the owners and operators thereof have entered into a combination, and do combine and fix the prices of grain, and prevent competition in the purchase price

thereof, and that there are not sufficient facilities for the handling and shipping of grain at said station.

"Third. That it is necessary for the convenience of the public patrons and shippers of grain of said railroad company, that another elevator be erected and operated at said station.

"Fourth. That the defendant has permitted two elevators to be erected upon its grounds at said station, and that the same are now being operated, and that the said defendant has refused to grant the same privilege to the complainant.

"Fifth. That an elevator is necessary for the shipment of grain by railroad, and that, by reason of the side track being placed within the right of way and depot grounds, the plaintiff cannot ship grain without building its elevator upon the grounds of the defendant.

"Sixth. That there is room upon the grounds of the defendant at said station for another elevator without materially interfering with the operation of said railroad, and the building of the elevator by the plaintiffs upon said ground will not materially affect the defendant in the use of its grounds, or be an unreasonable burden to the defendant.

"Seventh. That granting the right and privilege by the defendant to the elevators now standing upon its right of way and depot grounds at said station, and refusing to grant the same right and privilege to the complainant, is an unjust and unreasonable discrimination against the complainant, under the circumstances of this case.

"Eighth. That the said respondent has discriminated against the complainant, and that it has unlawfully made and given a preference and advantage to Adams & Gilbert, and to Eells Bros., owners and operators of elevators at said station.

"It is, therefore, by the board of transportation of the state of Nebraska, considered, adjudged, and ordered that the respondent, the Missouri Pacific Railway Company, shall cease and discontinue discriminating against the complainant, and grant to said complainant

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the same facilities and privileges as granted to the owners and operators of the elevators now established at said station, and that said respondent, within ten days after the service of this order, grant and give to the complainant, on like terms and conditions as granted to the said Adams & Gilbert and Eells Bros., the right and privilege of erecting an elevator upon its ground at said station, adjacent to said respondent's side track, at a convenient and suitable place thereon, to wit, at a point on the side track of said respondent near the east terminus of said side track, or some other suitable and convenient place on said side track, if the parties to this action can agree, and that said respondent grant to the said complainant all and equal facilities for the handling and shipping of grain at said station which it grants and gives to other shippers of grain at said station, and cease from all discrimination or preferences to and of said shippers and operators of elevators at said station of Elmwood aforesaid."

The railway company not having complied with that order, there was presented to the supreme court of the state of Nebraska, on January 7, 1890, a petition in the name of the state of Nebraska, at the relation of the board of transportation, and signed by the attorney general of the state, setting forth the proceedings and order of the board of transportation, and praying for a writ of mandamus to the railway company to compel them to comply with that order.

To this petition for a mandamus the railway company filed an answer, setting up the same defenses as before the board of transportation, and relying upon the provisions of the fourteenth amendment of the constitution of the United States, which prohibit any state to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws.

Upon a hearing on this petition and answer, the supreme court of Nebraska on May 13, 1890, "found the issues in favor of the relators," and adjudged that, unless the railway company, within 40

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days, complied with the order of the board of transportation, a writ of mandamus should issue to compel a compliance with that order according to its terms. *State v. Missouri Pac. R. Co.*, 29 Neb. 550. The railway company sued out this writ of error.

John F. Dillon, for plaintiff in error.

A. S. Churchill and *Geo. H. Hastings*, for defendant in error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The arguments in this case have taken a wider range than is required for its decision. The material facts, as assumed by the court below, are as follows:

The Missouri Pacific Railway Company, a corporation of the state of Nebraska, was the owner of the right of way and depot grounds, within which were its main and side tracks, its stations and other shipping facilities, at Elmwood, in that state, and had permitted two elevators to be erected and operated by private firms on the side track at that station.

John W. Hollenbeck and others (apparently not a corporation, but a voluntary association of persons owning farms and leaseholds in the neighborhood of Elmwood, upon which they raised corn, wheat, oats, and other cereals, large quantities of which were ready for market) made an application in writing to the railway company to grant them "a location on the right of way at Elmwood station aforesaid for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of" the applicants, "as well as the products of other neighboring farms." That application was refused by the railway company.

The applicants then made a complaint to the board of transportation of the state of Nebraska, alleging that the two elevators already built on the right of way of the railway company at Elmwood station were, "during certain seasons of the year, wholly insufficient in affording a market for the cereals of the complainants

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and others desirous of marketing their grain," and that the refusal of the railway company to grant to the complainants a location for an elevator was in violation of the Nebraska statute of 1887, c. 60, in that such refusal was an unjust discrimination, and that the railway company, by such refusal, was subjecting the complainants to an undue and unreasonable prejudice and disadvantage in respect to traffic facilities, over other localities, and was giving an undue and unreasonable preference and advantage to the owners and operators of the two elevators already built at that station.

The board of transportation, after notice to the railway company, and hearing evidence and arguments, found that the two existing elevators were insufficient to handle the grain shipped at Elmwood station, and the owners and operators of those elevators had entered into a combination to fix the prices of grain, and to prevent competition in the price thereof, and there were not sufficient facilities for the handling and shipping of grain at that station; that it was necessary for the convenience of the public that another elevator should be erected and operated there; that, by reason of the side track being placed within the right of way and depot grounds, the complainants could not ship grain without building their elevator upon the grounds of the railway company; that there was room upon those grounds for another elevator, without materially interfering with the operation of the railroad, and the building of an elevator thereon by the complainants would not materially affect the railway company in the use of its grounds, or be an unreasonable burden to it; and that the granting by the railway company of the right and privilege to the owners of the two elevators now standing, and refusing to grant the like right and privilege to the complainants, was an unjust and unreasonable discrimination against the complainants, and unlawfully gave a preference and advantage to the owners of the two existing elevators.

The board of transportation thereupon ordered that the railway company, within 10 days, grant to the com-

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plainants, on like terms and conditions as granted to the owners of the two existing elevators, the right and privilege of erecting an elevator upon its grounds, and adjacent to its track, at a point specified in the order, or at some other suitable and convenient place, if the parties could agree, and grant to the complainants all and equal facilities for the handling and shipping of grain at that station which it granted to other shippers of grain there, and cease from all discrimination or preference to and of shippers and operators of elevators at that station.

The railway company not having complied with the order, the supreme court of the state, upon a petition in the name of the state, at the relation of the board of transportation, for a mandamus, and an answer thereto and hearing thereon, found the issues in favor of the relators, and adjudged that, unless the railway company, within 40 days, complied with the order of the board of transportation, a writ of mandamus should issue to compel compliance with that order according to its terms. In the opinion of the court, it was said: "The correctness of the findings of the board is not seriously questioned, but its power to make such findings and order is denied." *State v. Missouri Pac. R. Co.*, 29 Neb. 556.

The statute of Nebraska of 1887, c. 60, §§ 1-3, prohibits, and declares to be unlawful, all unjust and unreasonable charges made by a railroad company for any services rendered in the transportation (which includes all instrumentalities of shipment or carriage) of passengers or property, or in connection therewith, or for the receiving, delivering, storage, or handling of such property. The demanding or collecting, directly or indirectly, by a railroad company, from any person, of a greater compensation for such service than it demands or collects from any other person for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is declared to be unjust discrimination. It is also made unlawful to give any preference or ad-

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vantage to, or to subject to any prejudice or disadvantage, any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever; and railroad companies are required, according to their respective powers, to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such contracting lines.

By section 17, upon complaint in writing concerning any lack of facilities or accommodations furnished by a railroad company for the comfort, convenience, and accommodation of individuals and the public, or concerning any unjust discrimination against any person, firm, corporation, or locality, either in rates, facilities furnished, or otherwise, the board of transportation, whenever, in its judgment, any repairs of, or additions to, or changes in, any portion of the road, rolling stock, stations, depots, station houses, or warehouses of a railroad company, are necessary in order to secure the safety, comfort, accommodation, and convenience of the public and individuals, or any change in the mode of conducting its business is reasonable and expedient in order to promote the security and accommodation of the public, or to prevent unjust discrimination against persons or places, is directed to order the railroad company to make such repairs, additions, or changes.

The supreme court of Nebraska has construed this statute as authorizing the board of transportation to make the order questioned in this case, which required the railroad company to grant to the relators the right to erect an elevator upon its right of way at Elmwood station, on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon. The construction so given to the statute by the highest court of the state must be accepted by this court, in judging whether the statute

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conforms to the constitution of the United States. Chicago, etc., R. Co. v. Minnesota, 134 U. S. 418, 456; Illinois Cent. R. Co. v. Illinois, 163 U. S. 142, 152.

A railroad corporation doubtless holds its station grounds, tracks and right of way as its private property, but for the public use for which it was incorporated, and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. Railroad Co. v. Richardson, 91 U. S. 454. But how far the railroad company can be compelled to do so against its will is a wholly different question.

Upon the admitted facts of the case at bar, the railroad company had granted to two private firms the privilege of erecting elevators upon its right of way at Elmwood station, and had refused an application of other private persons, farmers in the neighborhood, for the privilege of erecting on that right of way a third elevator of sufficient capacity to store from time to time the grain produced upon their farms and upon those of their neighbors, and has been ordered by the board of transportation, and by the supreme court of the state, to grant to the applicants a location upon its right of way for the purpose of erecting thereon such an elevator, upon the like terms and conditions as in its grants to the owners of the two existing elevators.

The only particular alleged in the complaint, and the only one, therefore, presented for our consideration in this case, in which the railroad company is supposed to have made an unjust discrimination against the complainants, or to have subjected them to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other locations, or to have given an undue and unreasonable preference to other persons, is the refusal of the railroad company to grant to the complainants a location upon its right of way, for the purpose of erecting an elevator thereon, upon the terms and conditions upon which it had previously granted to

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other persons similar privileges to erect two other elevators.

The record does not show what were the terms and conditions of the contracts between the railroad company and the owners of those elevators, nor present any question as to the validity of those contracts.

Nor does it present any question as to the power of the legislature to compel the railroad company itself to erect and maintain an elevator for the use of the public, or to compel it to permit to all persons equal facilities of access from their own lands to its tracks, and of the use, from time to time, of those tracks for the purpose of shipping or receiving grain or other freight, as in *Rhodes v. Railroad Co.*, 34 Minn. 87; in *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, and in *Hoyt v. Railroad Co.*, 93 Ill. 601.

Nor does this case show any such exercise of the legislative power to regulate the conduct of the business, or the rate of tolls, fees, or charges, either of railroad corporations or of the proprietors of elevators, as has been upheld by this court in previous cases. *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Dow v. Beidelman*, 125 U. S. 680; 34 Am. & Eng. R. Cas. 322; *Budd v. New York*, 143 U. S. 517; *Brass v. State of North Dakota*, 153 U. S. 391; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 213, 214; 61 Am. & Eng. R. Cas. 1; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 696.

The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way.

The order in question was not, and was not claimed to be, either in the opinion of the court below, or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals voluntarily associated together for their own benefit. They do not appear to have been

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incorporated by the state for any public purpose whatever, or to have themselves intended to establish an elevator for the use of the public. ' On the contrary, their own application to the railroad company, as recited in their complaint to the board of transportation, was only " for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms."

To require the railroad company to grant to the petitioners a location on its right of way for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company, for the accommodation of its own business, or for the convenience of the public.

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States. *Wilkinson v. Leland*, 2 Pet. 627, 658; *Murray v. Hoboken Co.*, 18 How. 272; 276; *Loan Assoc. v. Topeka*, 20 Wall. 655; *Davidson v. New Orleans*, 96 U. S. 97, 102; *Cole v. La Grange*,

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113 U. S. 1; Fallbrook Dist. v. Bradley, 164 U. S. 112, 158, 161; State v. Chicago, M. & St. P. R. Co., 36 Minn. 402.

Judgment reversed, and case remanded to the supreme court of the state of Nebraska for further proceedings not inconsistent with this opinion.

BECKER

v.

PHILADELPHIA & R. T. R. Co.

(177 Pa. St. 252.)

Condemnation of Land—Assessment of Damages.—Where an issue was awarded by consent of the parties to determine the amount of damages which the plaintiff was entitled to in consequence of the entry upon, taking, and occupation of certain premises, no question as to the injury to the stock of merchandise, nor to the business of the plaintiff can arise, but the value of the land taken is all that is to be determined.

Same.—In proceedings to assess damages for the taking of land, no recovery can be had for the taking of personal property, unless it was as materials used in construction.

Same—Recovery for Loss of Profits.*—Loss of profits of a business carried on upon the premises by reason of the taking of the place of business cannot be recovered in condemnation proceedings.

Interest on Damages in Condemnation Proceedings.—In condemnation proceedings, the jury, in assessing damages, is not entitled to give interest upon them, but, if they find that there has been additional damage because of the lapse of time after the taking of the property, they may add to the amount of their verdict.

Same—Ascertainment of Market Value.—The market value as a measure of damages for land taken or injured by a railroad company cannot be ascertained by evidence of particular sales of other properties alleged to be similarly situated.

APPEAL from Philadelphia county court of common pleas. *Affirmed.*

Among the assignments of error were the following: "(1) The court below erred in overruling the

*Note.—See 4 Rap. & Mack's Digest 701; 22 Am. & Eng. R. Cas. 99.

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following offer made by the plaintiff at the trial of the cause: 'Plaintiff offers to show by the witness that he was the owner of the premises 1114 Arch street; that he was carrying on his business in that building, being that of a merchant tailor, and for the purposes of his business he had a large amount of merchandise, consisting of cloths and other fabrics, especially purchased for his trade at this place; that by reason of the location of the defendant's road plaintiff could no longer carry on his business, and in consequence of said location said property was greatly injured and damaged; to show by the witness the difference between the market value of the merchandise or fabrics in the store to be used on the premises, and what they would be worth to be removed and applied to the same or some other use.' (2) The court below erred in not admitting the evidence under the offer set forth in the first assignment of error. (3) The court below erred in refusing to charge the jury as requested by the counsel for plaintiff, as follows: 'Seventh. You will find the value of the plaintiff's property as of May 14, 1891, and you may allow additional damages in the way of interest for the lapse of time as a compensation for the delay in payment, and you may take the ordinary rate of interest as the fair measure of such damage.' Answer of the court: 'I decline that point, having already instructed you in my general charge as to what the law is with respect to damage because of the lapse of time, if there be any.' (4) The court below erred in affirming the defendant's eighth point, as follows: 'Eighth. The prices of the premises No. 1110, No. 1112, and No. 1125 Arch street, paid by the finance company for the railroad company in March, 1888, are not evidence of general selling value of property in the neighborhood, and should not be taken by the jury as evidence of such general selling value.' (9) The court below erred in charging the jury as follows: 'You are not entitled to give interest upon the damages, but you will remember that this property is taken as of the 14th day of

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May, 1891, and in estimating the amount of your verdict, if you find that there has been additional damage because of the lapse of time, you will add to the amount of your verdict; but this is entirely a question for you.' "

Defendant's sixth, seventh, eighth, and ninth points, and the answers thereto, were as follows: "Sixth. The market value of the premises in question is not to be fixed by the jury by evidence of particular sales of alleged similar property in the same neighborhood. Particular sales are not evidence of general selling value. Individual sales are governed by the circumstances of each case. The jury is to arrive at the general selling value of property in the neighborhood, which is the criterion by which the value of the plaintiff's property is to be measured, by the opinions of witnesses who, by their testimony, are shown to have the most experience, and give the best reasons for their judgment. Answer of the Court: I affirm that point. Seventh. Evidence of the amount paid by the railroad company itself for other property in the neighborhood is not to be taken by the jury as evidence of the general selling value of their property, and such general selling value is not to be fixed thereby. Answer of the Court: I affirm that point. Eighth. The prices of the premises No. 1110, No. 1112, and No. 1125 Arch street paid by the finance company for the railroad company in March, 1888, are not evidence of general selling value of property in the neighborhood, and should not be taken by the jury as evidence of such general selling value. Answer of the Court: I affirm that point. Ninth. If the jury believe that the plaintiff's witnesses based their opinion of the value of the plaintiff's ground as vacant land upon the prices paid by the railroad company for Nos. 1110, 1112, and 1125 Arch street, and did not take into consideration in forming their opinion the prices paid for other properties upon Arch street, which were sold about the time in question, the jury may disregard the opinion of such of plaintiff's witnesses who so testified. Answer of the Court: I decline that point."

On the question of compensation for property taken for public purposes the court charged: "The measure of that compensation is the market value of the property at the time it was taken, which time is conceded to be the 14th day of May, 1891. Now, market value is the price which the property would probably bring at a well-conducted sale, to which proper attention has been called, and where every possible purchaser would have an opportunity to bid. It is not the price at which particular properties in the neighborhood about it have been sold. It is the general selling price which determines the market value. As you readily see, the particular sales depend upon the urgency, the necessity, upon the whim and fancy, if you choose, of the particular individual who chooses to buy that especial property; but that is not the test. An illustration of the impropriety of applying such a test is given in the present case. Suppose a railroad which has invested, or is about to invest, millions of dollars in the establishment of such a highway. Under the law the man who is living in his own house, dwelling in it, has such a right in it that this highway cannot take such a property. Now, assume a property of little comparative value standing in the way of such improvement. As you see, the railroad would be required and compelled, by the necessities and urgencies of the situation, to pay for that property what might be very much beyond its market value; so that I call your attention to the fact that what you are to ascertain is the general selling price, such a price as the property under proper and suitable circumstances would be likely to bring in the market at such a sale as that to which I have called your attention. You will regard the property with all of its advantages and disadvantages,—its location, the side of the street upon which it was situated, the size of the lot, the character of the improvements upon it,—and endeavor to determine, considering all the facts in the case, as to what that market value is. You should consider it with respect to the best uses to which it can probably be put. This was a property which was fitted as a

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merchant tailoring establishment, and in considering its value you will give to it the benefit of the uses to which it could probably be put if offered for sale in the market. If the prospective coming of the railroad has had the effect of enhancing the market values of properties in the neighborhood, and this particular property as well, the plaintiff is entitled to the benefit of that enhancement. As you readily see, to deprive him of it would be unjust to him. If a coming railroad increases the values of property in the neighborhood, that is a benefit it confers upon the community, for which there is no recovery upon its part; and the plaintiff, like every other property owner, would be entitled to that proportion of it which comes to his property. In endeavoring to ascertain from the evidence which you have had presented to you in this case what that market value is, there are certain facts which appear. In the first place, you have the assessed value of this property, or the assessment which the real-estate assessor, representing the city of Philadelphia, has placed upon it. The assessment of this property at the time at which it was taken was \$17,000, and Mr. Adair, a real-estate assessor, testified to you that their habit in making their assessments was to fix them at about eighty per cent. of what they regarded as the value. This is one fact, and in considering it you will remember, however, that that assessment is made for the purposes of taxation, and not with a view of ascertaining for purposes of sale what the market value is. You have also presented to you what was the cost of this property and the improvements upon it. Mr. Becker has testified to you that when he bought this property in 1882 he paid for it \$25,000, and he has further testified to you that he has expended in improvements upon it from \$27,000, to \$30,000. That would make, taking the highest figure of \$30,000, and adding it to the \$25,000 which he paid for the property, \$55,000. You will remember, however, that it is not a question of what a property costs which is presented to you. A thing may cost a great

deal more than it is worth, and it may also cost much less than it is worth. The real question is as to market value. You have also in evidence before you the rentals which have been produced by this property of the plaintiff. Mr. Becker has testified to you that the rental value was \$5,220 a year. For some of the stories and some parts of the building he had leases. As to the rest, he testified that offers were made. The actual amount received in the way of rentals was \$4,360, and he testified that he had offers amounting to \$860, which makes the total of \$5,220. Included in that item of rentals was the sum of \$2,500, which was the amount that he was paying to this defendant for the use of the first story, the part which he occupied after the time the defendant had given his bonds, and was entitled to take possession of this property. The defendant has disputed the value of that item by the testimony of Mr. Loomis, who says that it was intended not as to a determination of the rental value, but as a sort of penalty, in order that the defendant, when it wanted possession, should be enabled to get it. However, Mr. Kline and other witnesses have testified to you that that would be a proper rental value for that part of the premises. On the other hand, for the defendant, Mr. Bonsall estimates the rental at \$3,850, Mr. Jackson at \$3,600, Mr. Foulke at \$3,000, and Mr. Craven at from \$3,000 to \$3,500. In addition to this testimony concerning the rental values, you have what constitutes the most of the evidence in the case, the testimony of experts who have given you the benefit of their judgment as to what was the market value of this property. I shall not attempt to review that testimony at all. It has been fully argued before you. Twelve witnesses for the plaintiff have testified, and they differ in the amounts which they have presented to you from the lowest sum of \$70,000, which is the amount fixed by Mr. Miller, Mr. Hancock, Mr. Sylvester, and Mr. Lynch, to \$80,000, which is the estimate of Mr. Hasson and the two Messrs. Becker. On the other hand, eleven witnesses for the defense have given you their views as to what is the mar-

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ket value of the property, and they range from \$40,000, the estimates of Messrs. Potts, Sibbs, and Sylvester, to \$46,000, the estimate of Mr. Redner. You will consider their testimony carefully. I have listened to it myself and have gone over it more or less, and for my part I see no principle upon which it can be reconciled, nor do I see any principle which accounts for their difference of view, because, while a great deal has been said about the prices of properties which were sold to the railroad in the neighborhood, several of the witnesses for the defense, at least, have testified to you that they considered the prices of the properties sold to the railroad in reaching their estimates. You will take all of the testimony presented to you by these experts, and you will weigh the evidence, look at the reasons that they have given for the conclusions they have reached, consider their experience, their knowledge of the particular property, the grounds on which they base their judgment, and weigh it with all the care that you can give to it, and endeavor to reach a correct conclusion."

W. Horace Hepburn, for appellant.

Thomas Hart, Jr., for appellee.

GREEN, J. In this case the petition for the appointment of viewers set forth that the defendant had located its railroad, and that it was necessary to occupy certain land at its terminus, of which the plaintiff was the owner, and prayed the court to appoint viewers to ascertain the damages sustained by the plaintiff by reason of the occupation of his land for the purposes of the road. A description of the lot or piece of ground to be occupied was annexed. An issue was awarded by consent of the parties "to determine the amount of damages which the said Henry Becker is entitled to in consequence of the entry upon, taking, and occupation of premises No. 1114 Arch street, by the Philadelphia & Reading Terminal Railroad Company." It will be seen, therefore, that the sole question to be determined was the

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damages sustained by the plaintiff by reason of the taking of certain land belonging to him. No question as to the taking or injuring of personal property was within the terms of the issue, and hence no such question was on trial. As a matter of fact, no personal property was taken or injured in any way, nor was there any proposition to take or injure that kind of property. The value of land taken was the only matter for trial or which could be tried under the pleadings. Nevertheless the plaintiff now complains that he was not permitted to show that he was carrying on a business of tailoring on the premises, that he had a large amount of merchandise purchased for his trade at this place, that by reason of the location of the railroad on his premises he could no longer carry on his trade there; and he offered to show the difference between the market value of his merchandise and fabrics in the store and what they would be worth to be removed to some other place, and applied to the same or some other use. It was a very surprising offer of proof, and is the first of its kind of which we have any cognizance. We are referred to no authority in support of such an offer, nor do we know of any. There are plenty of reasons why such an offer cannot be entertained, and we cannot imagine any why it should be. It is enough to know that no such question arises, or can arise, under the pleadings. It is the value of land taken that is to be inquired of and determined under the issue frame; not personal estate of any kind, not profits of business, nor any kind of injury to any stock of merchandise, nor whether a better business could be done with a particular stock of goods on these premises or on some other. No personal property was taken, or injured, or touched, or handled in any way. The plaintiff had ample time in which to remove his goods. He agreed with the defendant, after the bond was filed, in writing, to occupy the premises for a short time at a rental value, and that the defendant might enter at the end of that time if he had not then removed. He was allowed to prove every kind of injury and damage sustained by taking his property, and recovered an

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exceedingly large verdict, much larger than the total cost of the property, and four or five times as large as the amount at which it was assessed. The new constitution made no change in the character of the property for which damages could be recovered. It merely enlarged the right of recovery from taking to injury or taking. It was the taking of land only that could be recovered for under the act of 1840, and up to the time of the constitution of 1874, and after that it was the injuring or destroying, as well as the taking, that was to be compensated.

Name - Personal
Property.

But recovery for taking personal property, unless it was as materials used in construction, was not recognized or provided for by proceedings for condemnation, either before or after the constitution of 1874. Of course, for any trespass to personal property by taking or injuring it, there was always a common-law liability, but that is not this case.

We have so often said that the profits of business could not be recovered in condemnation proceedings that it

Name—Loss of
Profits.

seems like a waste of time to cite the decisions. As far back as *Thoburn's Case*, 7 Serg. & R. 411, it was held that in estimating the damages done to the landowner the jury are to value the injury to the property at the time the injury was suffered, without reference to the person of the owner or the state of his business. The allowance of damages for an actual or supposed loss of profits in a business carried on upon the premises by reason of the taking was most emphatically condemned in the opinion, and that decision has been followed by this court from that day to this. There, a real and serious injury was done to the plaintiff, as well to his business as to his land. He owned a tract of 71 acres with a cotton mill on it, near the river Schuylkill. His land was damaged by the backing of water from the defendant's dam, and his business was so impeded that he was obliged to remove it to another place; yet this court held he could recover nothing for the injury to

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his business, but only for the injury to his land just as it was at the time it was flooded. Damages were claimed not only for the land, but also for the injury to the business. GIBSON, C. J., after stating that the compensation was to be the price of the privilege to swell the water to a particular height for an indefinite time, said: "Now, this price was due the moment the privilege was entered upon, and the price could be ascertained, which was obviously the time when the obstruction was first completed. The jury were, therefore, to ascertain what was then due; and the amount, clearly, could not be enhanced, or in any way affected, by subsequent injuries, the consequences of the obstruction. * * * But as the particular injury to the plaintiff in his business as a manufacturer was necessarily subsequent to the erection, and as the defendant prayed the direction of the court on the legal effect of the evidence relating to that part of the case, he was entitled to have it, for so far it would have operated in his favor. * * * It is evident that the profit in any branch of manufactures must mainly depend on the amount of capital invested, the number of workmen employed, and the extent of the business carried on." After stating the injustice of allowing for the profits of business to be carried on, the chief justice added: "That would make the defendant an insurer of ordinary profits in a new state of the business, pushed to a morbid extent, and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences to the individual to be compensated are ascertained." In the case of *Searle v. Railroad Co.*, 33 Pa. St. 57, an effort was made to recover damages for the value of the coal lying under the surface of the ground taken for a railroad. But we held this could not be done, and that the measure of damage must be the actual value of the land taken, and not the loss of profit which might be made by taking the mineral underneath it. LOWRIE, C. J.,

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speaking of the rejection of an offer to prove that there was \$4,000 worth of coal under the land,—about one acre,—said: “We do not measure the value of land by such facts. Land may have \$4,000 worth of coal per acre in it, and yet sell at \$40 per acre. * * * Moreover, the offer impliedly requires a degree of refinement in the measure of values which seems to us totally incompatible with the gross estimates of common life. Though we might have the most accurate calculation of the quantity of coal in the land, yet, without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, and the times in which it would be brought out, and the market prices at those times, the quantity would not help us to the value of the land.. The gross estimates of common life are all that courts and juries have skill enough to use as a measure of value. All other measures are necessarily arbitrary and fanciful.” And so here the question whether or not the plaintiff’s business, with the stock of goods on hand, could be carried on at a greater or less profit at some other place than on these premises is altogether speculative, remote, imaginary, and uncertain. No one can possibly have definite knowledge upon such a subject. It would depend upon contingencies, events, and methods which are incapable of statement, appreciation, or knowledge. What one man might do at a profit, another might only do at a loss. What this plaintiff might be able to do with his stock at another building, neither he nor any one else could possibly know. Perhaps he might do better, and perhaps he might do worse. It is enough to say that such contingencies are too uncertain and too remote to be tolerated as a source of proof upon which courts and juries could act with any safety. In *Railroad Co. v. Balthaser*, 119 Pa. St. 472, we held that the value of the plaintiff’s land as limestone land is a proper subject of consideration, but not the value of the stone under the road. In *Railroad Co. v. Patterson*, 107 Pa. St. 461. we held that the jury cannot take

into consideration any supposed loss to the plaintiff of profits in his business, by reason of the appropriation of his property by the railroad company. Said CLARK, J.: "Such an assessment would be purely speculative, and a rule which justified it would lead to most ruinous results." The same doctrine was held in *Railroad Co. v. Eby*, Id. 166. There are many authorities that the removal of personal property cannot be considered as an item of damages in the taking of real estate. In *Lewis*, Em. Dom. 488, it is said: "But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation;" citing a number of cases. In *Cobb v. City of Boston*, 109 Mass. 438, it was held that, in assessing the value of a leasehold estate, damage to the business of the lessee and its good will is not to be included. The court said: "The only question was as to the value of his unexpired lease, and not as to the profits of his business, or the inconvenience of removing it to some other place." To the same effect is *Edmonds v. City of Boston*, 108 Mass. 535. Further references are unnecessary. The first and second assignments of error are dismissed. There is no merit in the third and ninth assignments. The learned court below charged the jury on the subject of interest in precise accordance with the decision of this court in the case of *Klages v. Terminal Co.*, 160 Pa. St. 386, 57 Am. & Eng. R. Cas. 485, where this whole subject was exhaustively reviewed by our Brother Williams.

Interest on Dam-
ages in Condemna-
tion Proceedings.

The rulings of the court below as to the testimony in relation to sales of particular properties in the neighborhood were in conformity with our most recent decisions, and were, therefore, free of error. In *Railroad Co. v. Patterson*, 107 Pa. St. 461, we held that the market value as a measure of damages for land taken or injured by a railroad company cannot be ascertained by evidence of particular sales of other properties alleged to be situated similarly to the one in question. Such

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evidence would introduce collateral issues, and is not admissible in such proceedings. See, also, *Railway Co. v. Vance*, 115 Pa. St. 325, and *Curtin v. Railroad Co.*, 135 Pa. St. 20, 44 Am. & Eng. R. Cas. 130. Of course, such evidence may be brought out by the cross-examination of witnesses. In view of all that was said by the court on this subject in the general charge and in the answers to the sixth, seventh, and ninth points of the defendant, and in view of the testimony as to the three properties mentioned in the defendant's eighth point, we think the affirmance of the defendant's eighth point was correct, and, therefore, the fourth assignment of error is not sustained.

The remaining assignments of error are not pressed in the argument for appellant, and we think they are without merit, and hence are not sustained. Judgment affirmed.

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v.

RICKETTS.

(Court of Appeals of Kentucky, Nov. 21, 1896.)

Time Allowed Passengers to Leave Train.—(1) There is no obligation upon a railroad company to keep its train waiting until passengers can leave the platform, but it need only give them reasonable time in which to leave the train safely, and to get out of the way of the cars.

Lighting of Platforms.—(2) A railroad company is not required to so light its platform as to admonish its passengers that such platform is exclusively used for passengers; but the platform should be so lighted as that, by the exercise of ordinary care, the passengers can ascertain that it is the platform used for passengers.

APPEAL from Marion county circuit court. *Reversed.*

Lisle & McChord and *H. W. Bruce*, for appellant.

Samuel Avritt, for appellee.

(1) See note at end of case.

(2) *Lighting Stations.*—See 23 Am. & Eng. Ency. Law, 128; and see notes 41 Am. & Eng. R. Cas. 194, 186; 44 Id. 432.

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DURELLE, J. This case is now before this court for the third time on appeal. Louisville, etc., R. Co. v. Ricketts, 93 Ky. 116. With one exception, the facts proven on the two former trials appear to have been substantially the same as those appearing on the trial which resulted in this appeal. The appellee, Ricketts, was a passenger on appellant's train from Louisville to Lebanon, which reached Lebanon about 11 o'clock at night. When the train reached the station, he descended on the right-hand side, where no lights were kept, and walked beside the train "about three or four feet from the railroad," in the direction of the engine, while the train was in motion, pulling out of the station. He stumbled over a box which had been put around a water crane nearly opposite the south end of the passenger platform, which was on the left-hand side of the track. In falling, his left arm extended over the rail, and was so crushed as to necessitate amputation. For the injury thus received, this suit was brought. The law laid down in the two former opinions of this court is the law of the case, if the facts appearing on the trial are the same as on the former trials. In both the former opinions it was held that, when a railroad company "has a platform and other facilities for entering and leaving the cars with safety on the depot side of the track, the failure to have the opposite likewise prepared as a place for entering and leaving the cars cannot be regarded as negligence. It may select and adhere to such arrangement of its depot and platform as it may see fit, if those are made safe and commodious." In this case the company's passenger platform was, and had been since about 1883, on the left side of the track, and, so far as appears from the evidence, was safe and commodious. Upon each of the former trials it was, by the pleadings, admitted to be well lighted, and recovery was sought upon the theory that it was the duty of the company to keep well lighted all parts of the depot to which the public had access. But after the second appeal, and over four years after the original reply was filed, an amended reply was filed, putting in

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issue the averment of the answer that the company had a well-lighted platform on the left of the train from which the plaintiff alighted, and denying that either platform on either side of the train was well and properly lighted. Appellee states upon this point: "I saw no difference on the two sides of the car where I got off. There was no light on the side where I got off, and I saw no light on the other side. There was no light on either side, except what came from the windows and doors of the cars." But he says elsewhere, "I got off on the right-hand side because it was more convenient for me, and nearer my mother's home." And again, "I always got off on the right-hand side." This would strongly indicate that no examination was made by him to ascertain on which side the platform was. In the second opinion this court said: "The plaintiff himself testifies there was no light at all upon the right side, and, as soon as he touched the ground, found, if unknown to him before, that there was no platform there; and, independent of the other features of the case, it was negligence on his part to attempt to leave the depot ground by going so near as he did to the train that he knew would soon be in motion." Upon the last trial, it is true, the plaintiff testified that after he got off the car he noticed that he was walking on a cinder platform; but what he called a "cinder platform" was merely cinders spread upon the ground, at or below the level of the rails, as shown by the photograph, while on the left side was a plank platform, 12 to 18 inches in height, upon which the other passengers alighted, and the baggage was deposited. In the former opinion this court said,—and the language seems to us to be applicable here: "On the other hand, the evidence makes it too plain for dispute that, if the plaintiff did not know, the exercise of ordinary care would have enabled him to discover, that the platform for use of passengers was on the left side of the train. All the passengers stopping at Lebanon got out on that side, including his traveling companion. The conductor and brakemen, with lanterns, were on that side. Baggage

was taken out on that side." If it was so dark on both sides of the train that, by the exercise of ordinary care, plaintiff could not discover the platform for the use of passengers, then the company is responsible for the injuries resulting from defective or dangerous arrangement of the premises upon the side on which he alighted, provided he was not negligent in alighting, or in his subsequent conduct. On the other hand, if the platform on the left-hand side was safe and commodious, and sufficiently lighted that the plaintiff could, by the use of ordinary care, ascertain that the platform for the use of passengers was on that side, and to enable him to alight in safety on that side, but without examination he alighted on the other side, he did so at his own peril.

The instructions given on the trial appear to us to be fatally erroneous. Instruction No. 4 is as follows: "The court instructs the jury that it is the duty of defendant, in operating its passenger trains, in stopping at stations, to give passengers a reasonable time to safely get off said train and out of the way of the cars, in safety, before starting the cars; and if they believe from the evidence that defendant's employees failed to give reasonable time for defendant to alight from the cars and leave the platform before starting the cars, and that plaintiff sustained injuries on account of such failure, the jury should find for the plaintiff." The latter part of this instruction is clearly error.

There is no obligation upon a railroad company to keep its train waiting until passengers can leave the platform. It is sufficient if reasonable time is given them in which to safely get off the train, and out of the way of the cars. Under the facts proven in this case, this part of the instruction was peculiarly misleading, for it left the jury to conclude that the train should have waited until the plaintiff could walk the length of the depot to Main street.

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Instruction No. 3 is also erroneous. It instructs the jury "that it was the duty of defendant to provide a

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reasonably safe, commodious, and, in the nighttime, a reasonably well-lighted platform, on one side of its road, to enable passengers alighting from the cars to leave the railroad premises in safety; and if the evidence shows that defendant failed to have its platform on the left-hand side of the railroad reasonably well lighted at the time plaintiff was injured, or sufficiently lighted to admonish plaintiff that the platform on the left-hand side of the road was exclusively used for passengers, then defendant cannot be excused from failing to keep the platform on the right-hand side reasonably safe and commodious for passengers leaving its depot premises, unless plaintiff knew that the left-hand side was exclusively used for passengers, or by the exercise of ordinary care could have so known; and if the preponderance of the evidence shows that the defendant so failed to keep the platform on the left-hand side of the road reasonably commodious and well lighted, and that plaintiff did not know, or by the exercise of reasonable care could not have known, that the platform on the left-hand side of the road was exclusively used for passengers, and that plaintiff sustained injuries on account of running against an obstruction on the right-hand side because said platform was not reasonably safe and commodious for passengers leaving its depot premises, the jury must find for the plaintiff." The company is not required to

Lighting of
Platform.

so light its platform as to admonish its passengers that that platform is exclusively used for passengers. That would require the other side of the depot to be lighted so as to admonish the passengers that it was not used for passengers at all. All that is required is that it should be so lighted as that, by the exercise of ordinary care, the passengers can ascertain that it is the platform used for passengers. The other side being not lighted at all is notice that it is not so used. Nor should the plaintiff's knowledge of the use of the platform on the left-hand side have been injected into the instruction. In the language of the last opinion, "Whether, in the language

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of the instruction, adoption of the platform on the left-hand side in lieu of that on the right-hand side was unknown to plaintiff, is not material. * * * For the reasons stated, the judgment is reversed and the cause remanded, with instructions to grant appellant a new trial, and for further proceedings consistent with this opinion.

NOTES.

Time to Leave Train—When Liable.—See notes to 16 Am. & Eng. R. Cas. 346, 52 Id. 289, 16 Id. 350; 30 Id. 578; 37 Id. 85; 39 Id. 452; 41 Id. 158, 168; 44 Id. 344; 58 Id. 229. It is the duty of a company to stop its train at a station for a reasonable time, in order that passengers may get on and off its cars with safety to themselves; and if it fails so to do, and injury results to passengers from the starting of the train while passengers are alighting, the company is guilty of negligence, and is responsible in damages for such injury.

Carr v. Eel River, etc., R. Co., 98 Cal. 366, 58 Am. & Eng. R. Cas. 239; *Rout v. Los Angeles, etc.*, R. Co., 103 Cal. 473; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292; *St. Louis, etc., R. Co. v. Person*, 49 Ark. 182, 30 Am. & Eng. R. Cas. 567; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 18 Am. & Eng. R. Cas. 234; *Toledo, etc., R. Co. v. Wingate, (Ind.)* 58 Am. & Eng. R. Cas. 232; *Lehman v. Louisiana Western R. Co.*, 37 La. Ann. 705; *Conway v. New Orleans, etc. R. Co.*, 46 La. Ann. 1429; *Straus v. Kansas City, etc., R. Co.*, 86 Mo. 421, *affirming* 75 Mo. 185, 27 Am. & Eng. R. Cas. 170; *Richmond v. Quincy, etc., R. Co.*, 49 Mo. App. 104; *Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 34 Am. & Eng. R. Cas. 422; *Chicago, etc., R. Co. v. Landauer*, 36 Neb. 642, 54 Am. & Eng. R. Cas. 640; *Onderdonk v. New York, etc., R. Co.*, 74 Hun (N. Y.) 42, 26 N. Y. Supp. 310, 56 N. Y. S. R. 190; *Flanagan v. New York, etc., R. Co.*, 5 Silv. Sup. Ct. (N. Y.) 495; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571; *Chicago, etc., R. Co. v. Arnol*, 144 Ill. 261, 58 Am. & Eng. R. Cas. 411; *Central R. & B. Co. v. Miles*, 88 Ala. 256, 41 Am. & Eng. R. Cas. 149; *reviewing Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600, 37 Am. & Eng. R. Cas. 12; *Central R. & B. Co. v. Letcher*, 69 Ala. 106, 12 Am. & Eng. R. Cas. 115.

For a statement of the rules as to the length of time railroad cars should stop at a station to allow passengers to alight, see *Keller v. Sioux City, etc., R. Co.*, 27 Minn. 178. *Reviewed in Griswold v. Chicago, etc., R. Co.*, 64 Wis. 652, 23 Am. & Eng. R. Cas. 463.

In an action for a personal injury received while alighting from a train, the evidence justifies a verdict for plaintiff, where it appeared that he was prompt enough in moving out of the car, that the stop was unreasonably brief, and that the conductor was not sufficiently careful in ascertaining whether all the passengers were out. *Illinois Cent. R. Co. v. Taylor*, 46 Ill. App. 141.

In an action by a woman in good health, sixty-five years old, and weighing one hundred and seventy pounds, and who was a passenger on defendant's train, to recover damages for personal injuries

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caused by starting the train when she was in the act of alighting, the jury may take into consideration the "age, sex, and physical condition" of the plaintiff in determining whether the train stopped sufficiently long to enable her to get off. *Hickman v. Missouri Pac. R. Co.*, 91 Mo. 433.

A railroad company is negligent in failing to stop its train at a station for a sufficient time to enable a female passenger, laden with heavy bundles, to get from her seat and alight from the train in safety. *Toledo, etc., R. Co. v. Wingate*, (Ind.) 58 Am. & Eng. R. Cas. 232.

Same—In Case of Sick or Decrepit Passengers.—Sick persons and persons unable to take care of themselves should provide themselves with proper assistance while traveling in railroad cars. And if a person is sick and, from inability to walk without assistance, requires longer delay at the station than is usual to alight, he should give timely notice thereof to the conductor. *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607. *Approved in Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128.

Carriers must afford a reasonable time to passengers, whether young or old, to leave the cars in safety, and if the time-tables do not allow sufficient time for this purpose, and an injury is thereby occasioned, the company will be liable therefor. But the age or decrepitude of a passenger will not determine the time of the stoppage of a train on its arrival at a station. *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19.—*Quoted in Dawson v. Louisville, etc., R. Co.*, (Ky.) 11 Am. & Eng. R. Cas. 134.

Same—When Not Liable.—When a reasonable time has thus elapsed it is no part of the duty of the servants of such corporation to make personal inspection of or to interrogate the remaining passengers to see whether they intend leaving the cars. The law imposes no such onerous duty upon a carrier of passengers, and if it should appear in evidence, in any given case, that passengers similarly situated, as to age, sex, and so forth, as the party complaining, have safely left the cars prior to any injury or accident complained of, this would afford ground for legitimate inference by the jury that sufficient time had been granted to the passenger, who sues for the negligent injury, to have alighted in safety. *Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 34 Am. & Eng. R. Cas. 422.

If a carrier of passengers by railway stops the train long enough for the passenger, by the use of reasonable expedition, to get off, then there is no cause of complaint. *Culberson v. Chicago, etc. R. Co.*, 50 Mo. App. 556.

It is the duty of railroad companies to stop their trains at stations a sufficient length of time for passengers to get on and off, and it is negligence for the conductor or other servant of the company to start a train while passengers are obviously in the act of getting on or alighting therefrom. But when a train has made a reasonable stop, and passengers have not given notice or other evidence of their intention to alight, the starting of the train is not *per se* negligence for which the company will be held liable. *Chicago, etc. R. Co. v. Landauer*, 36 Neb. 642, 54 Am. & Eng. R. Cas. 640.

Same—Jumping after Train Starts.—Where a train has failed to stop at its station a sufficient length of time to enable passengers to alight in safety, and a passenger upon the lower step just about to alight when the train starts, jumps off the train, within a dis-

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tance of less than 100 feet, the act of the passenger in leaving the car is not negligence *per se*. Carr v. Eel River & Eureka R. Co., 98 Cal. 366, 58 Am. & Eng. R. Cas. 239.

But in Fournet v. Morgan's etc. R. Co., 43 La. Ann. 1202, 52 Am. & Eng. R. Cas. 294, it was held that the omission of a train to stop for a sufficient length of time at a station, did not justify the plaintiff in jumping from the train while it was in motion.

Same—Declaration.—In McCaslin v. Lake Shore etc. R. Co., 93 Mich. 553, 52 Am. & Eng. R. Cas. 290, it was held in an action against a railroad company for injuries received by a passenger while alighting from defendant's train, where the declaration alleged that the train started before the plaintiff had reasonable time to safely alight, that declaration was not open to an objection that it did not distinctly aver that the train was not stopped for a sufficient length of time to enable plaintiff to alight.

Evidence.—Where defendant company had been allowed to introduce evidence that train stopped as long as, or longer than usual, plaintiff may show in rebuttal how long it was customary for defendant's train to stop at stations. Gulf, etc. R. Co. v. Rowland, 82 Tex. 166, 52 Am. & Eng. R. Cas. 298.

Same—Evidence as to Another Accident.—In Gulf, etc. R. Co. v. Rowland, 82 Tex. 166, 52 Am. & Eng. R. Cas. 298, it was held, that testimony given by one of plaintiff's witnesses of an accident which occurred at about the same date, and in about the same manner, was irrelevant.

Same—Question for Jury.—Where the evidence as to the time which a train stopped at a station is conflicting, plaintiff's witnesses having testified that it stopped from 10 to 20 seconds and defendant's witnesses that it stopped a minute, and that from 10 to 15 passengers, mostly ladies, got off the train, and one or two passengers got on it while it was at rest, the question whether the train stopped a reasonable and proper time to allow passengers to alight safely is for the jury. Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113, 41 Am. & Eng. R. Cas. 154.

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(Supreme Court of Wisconsin, Nov. 4, 1896.)

Fires Caused by Engines.*—An engine on a side track, seven feet

*Note.—See 5 Rap. & Mack's Digest, 927, 930; notes to 13 Am. & Eng. R. Cas. 488; 29 *Id.* 128; 35 *Id.* 244; 61 *Id.* 508, 509, 512; Hendersson v. Philadelphia, etc., R. Co., 144 Pa. St. 461, 48 Am. & Eng. R. Cas. 16; Union Pac. R. Co. v. Keller, 36 Neb. 189, 54 Am. & Eng. R. Cas. 535; McClellan v. St. Paul, etc., R. Co., 58 Minn. 104, 61 Am. & Eng. R. Cas. 509; Brown v. Benson, (Ga.), 5 Am. & Eng. R. Cas., N. S., 316.

See note at end of case.

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from a warehouse, emitted unusual quantities of large sparks which were carried by the wind toward the warehouse and a window in it twenty-five feet away. Some of the sparks went over the building, others settled upon it and against it, and disappeared. The inside of the warehouse was dry, but had been cleared the day before of all rubbish and loose combustible material. The window opened on an elevator shaft, and as the day had been hot, it was probable that any sparks entering it would be carried up by the current of air in the shaft. An hour and a half after the emission of the sparks the building was discovered to be on fire. *Held*, that there was not sufficient evidence to show that the fire was caused by sparks from the engine.

APPEAL from Dane county circuit court. *Affirmed*.

Action to recover damages for the destruction by fire of plaintiff's warehouse and store building attached thereto, which occurred on the 22d day of July, 1893, alleged to have been caused by negligence of defendant's employees. The warehouse was 40 feet long by 30 feet wide, located north of one of defendant's side tracks at Spring Green, Wis., and nearly parallel with such track. The southwest corner was about 7 feet, and the southeast corner about 14 feet, from the center of such track. It was a wooden, frame structure, 18 feet high to the top plate, with a gabled roof, one-third pitch, lengthwise of the building. There was a basement about 8 feet deep, from which, in the northwest corner, there was an elevator shaft 4½ by 5 feet, extending up to and ending in a cupola constructed wholly on the north side of the ridge of the roof. The cupola was 12 feet wide by 14 feet long. The sides extended about 3 feet above the ridge of the warehouse. It was covered by a gabled roof, with ends towards the north and south. The top was about 37 feet from the ground. In the south gable, towards the side track, was a window which, there was evidence tending to show, was open at the time of the fire, and was about 30 feet above and 25 feet north of the center of the track. The sides of the warehouse and the cupola were made of boards put on perpendicular, with battens over the cracks, and the whole painted. North of the warehouse, about 3 feet, was the south wall of a brick store building, the walls of which extended sev-

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eral feet above the plate of the warehouse. The space between the buildings was made into a covered alley connecting them together. The alley was floored at the bottom with pine boards placed about on a level with the floors of the buildings. Sixteen feet above the lower floor was a ceiling, which also formed a second floor. About 8 feet above such second floor, and 6 feet above the plate of the warehouse, was a covering of boards extending from the wall of the store building out a little over 3 feet. On the west end, the alley was closed. On the east end, it was closed up to the second floor. On the north, it was closed by the side of the store building. On the south, it was closed from the west end east to the cupola. From the southeasterly corner of the cupola east, it was left open, to admit light to windows in the upper story of the store building. On the edge of the roof of the warehouse, next to the alley, was placed a board, projecting up so as to form a gutter, the base of which was lined with tin. The openings in the warehouse were as follows: On the side towards the railway track, in the basement, there were three open windows. On the first floor, about the middle, was a door. There were also three grain spouts from bins on the second floor, closed at the lower ends, outside the building, by slides. On the east end, in the basement, were two open windows, and a way, constructed to admit of taking barrels in and out, which was covered by a slanting door. On the first floor, about the center, was a door. North of that was a window, and there was also a window opening into the alley. On the south side of the door was an opening for taking in corn, which was closed by a sliding door. In the gable, near the roof, was a window, and in the east side of the cupola, near the northeast corner, was a window. On the north side, on the lower floor, near the middle, was a door leading from the alley, and near the west end of the alley was another door from the alley. On the second floor of the alley was a door leading from such floor into the warehouse on a level with the plate. In the west end of the gable

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was a window. The sides of the elevator shaft, on the outside of the posts forming the framework of it, were sheathed with pine boards, except where the openings existed hereafter mentioned. The north side was formed by the side of the warehouse; the west, by the side of the wool room; the south, by the side of the buckwheat bin; and the east side, between the level of the plates and the second floor, by the oat bin. Inside the elevator was sheathed with $\frac{7}{8}$ -inch flooring on the north, south, and west. On the east side it was open in the basement, on the first floor, and above plates in the second story. On a level with the top of where it was so closed on the east, there was a passageway leading from the opening on the second floor of the alley to the centre of the warehouse, and there connecting with a passageway, running at right angles, lengthwise of the building, from end to end, on a level with the plate. All of the upper story, except that part occupied by the elevator shaft, was divided into bins, the top of which was on a level with the passageway. On the south side of such way were three bins of equal size, built hopper shape, in each of which there was some wheat at the time of the fire, two being nearly full. In the northeast corner was a corn bin partly filled with corn. The balance of the space on that side, up to the elevator shaft, was an oat bin, about half full of oats. The space between the elevator shaft and the wheat bin in the southwest corner was a small bin for buckwheat, which was empty. West of the elevator shaft, occupying the balance of the upper story of the building, in the northwest corner, was a wool room nearly empty, which was closed in on all sides from every other part of the building. The lower story was, to some extent, partitioned off, but there was no partition north of the centre of the floor and east of the elevator shaft. On the day before the fire the elevator was thoroughly cleaned and dusted out, from the cupola down, except the basement. The building was in an exceedingly dry condition, owing to a long-continued period of excessively hot, dry weather. The wind was

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blowing from the direction of the side track toward the building. The situation being as described, at 7:30 P. M. on the 22d day of July, 1893, one of defendant's freight trains was run in on the side track till the locomotive stood alongside of the warehouse. While it was in that position, there is evidence tending to show that it was so operated by defendant's servants that coals of fire and ashes were allowed to escape from the firebox to the ground, and sparks in considerable quantities to escape from the smokestack. About 8:15 P. M. the locomotive was backed away from the building, at which time, there is evidence tending to show, the engine was operated in such a way that the wheels slipped on the track, and that sparks were emitted from the smokestack in large and unusual quantities and of an unusual size, some appearing, to one looking at them through the darkness, to be as large as a man's thumb, and thrown to a height of 30 to 40 feet; that they were carried by a light wind towards the warehouse, some of them settling on the roof and others passing over it. There is a very little conflict in the evidence respecting the time when the freight engine backed away from the warehouse. It was not later than 8:17 P. M. The passenger train from the west was due at 9:49 P. M. On the evening in question it was late, and, according to the evidence, did not arrive earlier than 9:55 P. M. Witness J. G. Keller, while on his way to the 9:49 P. M. train, heard the alarm of fire first given. He testified that the train came from the west a few moments thereafter. There is some conflict in the evidence respecting the exact time when the fire was first discovered, but all the evidence shows that it was a short time before the arrival of the train from the west, and about the time it was due, viz. 9:49 P. M. The evidence is conflicting respecting the location of the fire when first discovered. There is considerable evidence tending to show that it was in the lower story of the warehouse; also, evidence tending to show that it was first seen in the lower part of the alley, looking through the window in the east end, and that soon thereafter it

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was seen in the upper part of the building. A large amount of other testimony was given tending to show that the fire started in the lower part of the structure, that it was very small when first discovered, that very soon after the discovery the alarm was given, and that soon the whole building was enveloped in flames. The building and contents, and the store building attached, with part of its contents, were destroyed. At the close of the evidence, on motion of counsel for defendant, the court directed a verdict in its favor, in the main upon the following grounds: (1) That the evidence is insufficient to show that the fire was caused by the defendant; (2) that the evidence is insufficient to show that defendant's engine was not in a proper state of repair at the time of the fire; (3) that the evidence was insufficient to show that the engine was improperly operated. Plaintiff's counsel then moved the court to set aside the verdict, and for a new trial, upon the grounds, among others, that the court erred in the omission and rejection of testimony, and that the verdict was contrary to the law and the evidence. The motion was overruled, and judgment was entered in favor of the defendant, from which this appeal was taken.

Olin & Butler, for appellant.

Burton Hanson, R. M. La Follette, and George W. Bird, for respondent.

MARSHALL, J. (after stating the facts). If there is anything in this case to warrant the inference that the destruction of plaintiff's property was caused by fire which proceeded from defendant's locomotive, it consists of evidence tending to show that sparks in unusual quantities and of unusual size, on the occasion in question, were projected from the smokestack to the height of from 20 to 40 feet, and then carried by a light wind in the direction of the warehouse, some of them settling upon the roof, and others passing over the structure, and the fire in the building that manifested itself about one hour and a half thereafter. The evidence of the escape of fire from the ashpan to the

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ground need not be considered, because it is conceded by plaintiff's counsel that, if the fire from the locomotive started the conflagration, it must have proceeded from the smokestack to the open window in the south side of the cupola, thence through such window and downward through the elevator shaft to a lodgment somewhere between the lower and second floor, at the point where the building was ignited. It cannot seriously be contended that there is evidence tending to sustain any other theory by which the fire was started, from any cause for which respondent is responsible; hence, unless such evidence, under the most favorable construction it will legitimately bear, including all reasonable inferences therefrom, assuming that it establishes all that it tends to establish (*O'Brien v. Railway Co.* [Wis.], 66 N. W. Rep. 363; *Fitts v. Railway Co.*, 59 Wis. 323; *Spensley v. Insurance Co.*, 54 Wis. 433), is sufficient to produce conviction in the minds of men of ordinary understanding, to a reasonable certainty (*Pelitier v. Railway Co.*, 88 Wis. 521), of the existence of the ultimate fact in issue, *i. e.*, that the fire which did the work started from the smokestack of the locomotive, it was not only proper for, but it was the duty of, the trial judge to direct a verdict for defendant. This court rigidly maintains, inviolably, the right of trial by jury, rejecting the rule that obtains in some jurisdictions, that if the evidence is such that a verdict in favor of one party would be set aside as contrary to the clear preponderance thereof, the court is warranted in directing the proper verdict, and upholds, as the law, that inferences from the evidence in the first instance should be drawn solely by the jury, except where, in any legitimate view of it, no reasonable inference can be drawn therefrom which will support a verdict other than one way. Then, the motion for a nonsuit or the direction of a verdict requires that disposition of the case, as a matter of right, which implies a judicial duty to grant it. Such disposition by no means trenches on the province of the jury, but is the exercise of a judicial function, essen-

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tial to the due administration of justice. It follows, from the preceding statement of legal principles governing this case, that the question here presented is largely, if not wholly, one of law, arising from facts and circumstances which are either conclusively established by the evidence or which we must assume to be established under the rules indicated. With that view, we proceed to restate briefly such facts. We have a combination of the following: It was dark. Sparks in unusual quantities and of unusual size, some appearing to one looking at them through the darkness to be as large as a hazelnut or a thumb nail, were projected from the smokestack of the locomotive, standing on the side track 6 or 8 feet from the warehouse. After reaching a height of from 30 to 40 feet, they floated northerly, carried by a gentle wind, blowing from a southerly direction, towards the warehouse and the open window in the south end of the cupola, which was located about 30 feet from the ground and 25 feet north of the side track. Some of the sparks passed entirely over the building, and others settled against and upon it and disappeared. The inside of the building was dry. There was no way for a spark to reach the lower part of the building, between the lower and upper floors, after passing in at the window in the cupola, except by passing down the elevator shaft to a point below the bottom of the second floor, and thence out from the open side of such shaft to the east. The building, from the cupola down to and including the space between the lower and second floors, had been, during the day previous, cleaned of all rubbish, dust, cobwebs, and other loose combustible material. The structure was discovered to be on fire somewhere between the first and second floors, about one hour and a half after the sparks were emitted from the smokestack, and fire was also seen in the cupola about the same time or soon after. It rapidly spread to all parts of the building, and consumed it and the one adjoining. Just where the fire first started does not definitely appear, but, looking at the evidence most favorably for plaintiff, it was

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somewhere in the lower story, as indicated, outside of the elevator shaft. Now, in view of the preceding, can a reasonable inference be drawn that a spark which escaped from the smokestack set the fire? Can the path of the fire, by reasonable inference from the facts established, be traced from such smokestack, starting at about 8:15 p. m., through the period of time to about 9:45 p. m., to the point where the building ignited, so as to thereby establish the main fact in issue? That was for the court. If such an occurrence is within reason, then it was for the jury to say whether the fire was so caused or not. Obviously, it is no objection that the origin of the fire was not established by direct evidence; but there must be some limit beyond which the main fact cannot be found from inference, else parties circumstanced like the defendant was may be held liable for all fires, occurring in the vicinity of their tracks, that can, by any possibility, be attributed to their conduct, unless able to prove that the fires are not so caused. Such a rule would subject railroad companies to such penalties as to seriously and unjustly cripple a business essential to the public welfare. The origin of a fire under such circumstances must be established so as to produce conviction, to a reasonable certainty, on an unprejudiced mind, the same as any other fact; and, until there is evidence to so establish it, the defendant is not called upon to prove that the fire was not caused as alleged. *Flanagan v. Railway Co.* (Minn.) 67 N. W. Rep. 794; *Stratton v. Railway Co.* (Colo. App.) 42 Pac. Rep. 602; *Railroad Co. v. De Graff*, 2 Colo. App. 42; *Railroad Co. v. Morton*, 3 Colo. App. 155; *Sheldon v. Railroad Co.*, 29 Barb. (N. Y.) 226.

In the light of the preceding, we will review briefly the principal cases cited by appellant's counsel to show that, according to precedents, this case should have been submitted to the jury. In *Gibbons v. Railroad Co.*, 58 Wis. 335, the fire was discovered three-quarters of an hour after the train had passed. A strong wind was blowing towards the point where the fire

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started. The weather was and had been for some time, very dry. There were old, rotten hemlock ties near the track, which were burned. The fire burned between such ties and plaintiff's property, spreading from such property to the ties, or the reverse. This appears from the printed case on appeal. The question of whether there was sufficient evidence to go to the jury was raised, but the cause was decided on another point. In *Tribette v. Railway Co.*, 71 Miss. 212, the fire was discovered in some cotton bales less than an hour after the locomotive passed, which was seen to emit smoke that was blown against the bales. There had been a long drought. Odor of burning cotton was noticed 10 or 15 minutes before the fire was discovered. When the fire finally manifested itself, holes in the cotton bales on the side towards the railway track indicated that it had been slowly eating its way into them for a considerable length of time. Under these circumstances, held that the evidence warranted the inference that the fire caught from a spark emitted from the locomotive. In *Ward v. Railroad Co.*, 29 Wis. 144, the statement of the case in the published reports is to the effect that about two hours elapsed between the passage of the train and the discovery of the fire, but the element of time did not enter into the questions discussed before the court, and decided. That explains why such statement is far from being accurate. An examination of the printed case and briefs used on the argument here, shows that there was an abundance of evidence tending to prove that the fire was discovered in less than an hour after the train passed, and there were circumstances, such as direction of the wind, emission of sparks, dryness of the building, and others, leading easily to the inference that fire from the locomotive did the mischief. In *Railway Co. v. Richardson*, 91 U. S. 454, the fire was discovered in one-half to three-quarters of an hour after the train passed. A strong wind was blowing. It was very dry. The fire started in the roof of a covered railroad bridge, through which the train passed, from which it was communicated to

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plaintiff's property, which was situated but a few feet from such bridge. Held by the trial court, that the circumstances warranted the inference that the fire was started by fire from the locomotive. The question does not appear to have been raised on the appeal. In *Cole v. Railway Co.* (Mich.) 63 N. W. Rep. 647, the element of time was not involved. Distance of property destroyed from right of way was the turning point. The fire was set on such right of way by a section boss, where there was dry grass and pieces of decayed wood. There was a very high wind, blowing directly towards plaintiff's building, situated 300 feet away, which was filled with hay and had the windows open. Held, that the question of the origin of the fire was for the jury. In *Hagan v. Railway Co.*, 86 Mich. 615, there was a strong wind, blowing from the track towards the property destroyed. It was very dry. As the engine passed plaintiff's building, the fireman was poking the fire. Smoke of a bluish green color, streaked with red, was seen to roll over the building, and in a few minutes the roof was on fire on the slope towards the railway track. Held that, under the circumstances, the jury were justified in inferring that the fire was caused by sparks from the locomotive. In *Beggs v. Railway Co.*, 75 Wis. 444, the facts were that it was a very dry time. A strong wind was blowing from defendant's track towards the property destroyed. The fire was seen soon after the train passed. It started in some dry grass on the right of way, near which, on the track, live coals had been deposited. From the starting point it was traced by a streak of burnt grass directly to the property destroyed. Held, that the evidence was sufficient to sustain a verdict for plaintiff.

We might go on, and analyze each of the numerous cases to which our attention has been called by appellant's counsel, and many more of the same character; but it would only result in further demonstrating, what the preceding clearly shows, that they fail utterly to fit this case. In each of the foregoing citations it will be observed that there was an unbroken chain of

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circumstances, starting with the escape of fire from the locomotive, and extending to the resulting fire complained of. Each fact, from start to finish, is such that, by reasonable inference, it is connected with the next in line,—all consistent with the rule that the plaintiff must not only prove that the fire which caused the injury may have proceeded from defendant's locomotive, but by reasonable affirmative evidence, to a reasonable certainty, that it did so originate. *White v. Railway Co.* (S. D.) 47 N. W. 146. Here the chain of circumstances is broken where the sparks disappeared in the direction of the warehouse. It is unreasonable to infer that cinders projected from the smoke-stack, so light as to float for a considerable distance in a gentle breeze, would retain fire any great length of time. It is unreasonable to infer that, if such material retained fire till it floated to the vicinity of the window in the cupola, it passed through such window, and down the elevator shaft. The night being hot and sultry, after a very hot day, reason teaches that the current of air in the elevator shaft must have been upward and outward. It is unreasonable, under the circumstances, to infer that if such material, still retaining fire, passed through the window and down the elevator shaft, it found a lodgment, and smoldered for an hour and a half without manifesting itself. The time is too long. Especially is this so in view of the fact that the structure had just been thoroughly cleaned of dust, cobwebs, and other loose combustible matter. In short, from the time the sparks disappeared in the direction of the warehouse, all the circumstances rebut, instead of corroborate, the theory that they had any connection with the fire that was started in the building an hour and a half thereafter. Candor compels us to say that reason and common experience in life, taking into consideration the operation of natural laws, must force this conclusion upon the ordinary understanding. All beyond the disappearance of the sparks is, at best, mere supposition and conjecture respecting what may possibly have occurred, instead of rea-

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sonable inference respecting what did occur. The element of time, without proof of facilities for lodgment of sparks in some substance liable to keep them alive, is sufficient of itself to break the chain of circumstances essential to reach from the alleged cause to the alleged fact. In *Sheldon v. Railroad Co.*, 29 Barb. (N. Y.) 226, the time between the alleged escape of fire from the locomotive and the discovery of the fire complained of was 1 hour and 17 minutes. It was alleged that the fire started by a spark passing through the open window of the mill, situated 67 feet from the railway track, that it lodged in some combustible material on the mill floor. The track master was in the vicinity 25 minutes after the train passed where he would have observed a fire in the building if any had existed. The court held that, under the circumstances, even 25 minutes was an unreasonable length of time, because, if a live spark lodged in combustible material on the mill floor so as to start a fire, it would manifest itself before the expiration of 25 minutes. With this view, among others, the court sustained the nonsuit. Here, without any proof of the existence of material in which the fire may have smouldered for a time before breaking out, the suggestion is that a spark passed in at the window in the cupola, 30 feet above the ground, took a devious course downward, lodged somewhere in the lower part of the building, and there remained for an hour and a half before manifesting itself. After a thorough search for and examination of precedents, we may safely venture the assertion that no satisfactory authority can be found for carrying the inference of the existence of facts unseen from those seen so far as would be required to send this case to a jury. In the words of Mr. JUSTICE ORTON, in *Gibbons v. Railroad Co.*, 58 Wis. 335, "mere possibility can never establish a probability of a fact requisite to be proved, in order to make a railroad company or any party liable in any action whatever, and the proposition is no sounder in logic than in law." But, without further discussion, we must hold that the nonsuit was properly granted. To

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decide otherwise would be to say that verdicts may rest on mere possibility, speculation, and conjecture. Where there is no legitimate basis for a verdict, courts certainly must be permitted to draw the line, else our system of jurisprudence cannot be maintained consistent with well-defined rules of justice and right. The judgment is affirmed.

WINSLOW and PINNEY, JJ., dissent.

NOTES.

In *Whitney Mfg. Co. v. Richmond & Danville R. Co.*, 38 S. Car. 365, 55 Am. & Eng. R. Cas. 612, it was held that it could not be claimed that the question of the destruction of cotton, while on the defendant's right of way, by fire communicated by the defendant's locomotive, still remained, where the door of the car next to the main track was closed, and there was no evidence whatever to show that the fire was the result of sparks from the locomotive, or of the acts of any of the employees of the railroad company.

Where a railroad is sued under Conn. Gen. St., § 3581, making railroad companies liable for injuries caused by fire communicated from their engines, and the company suffers default, and is heard on the question of damages, the default admits that the fire was communicated to plaintiff's property by defendant's engine. *Martin v. New York, etc., R. Co.*, 62 Conn. 331, 56 Am. & Eng. R. Cas. 79.

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v.

CITY OF DENVER *et al.*

(*Circuit Court of Appeals, Eighth Circuit, Oct. 26, 1896.*)

Railroad Companies—Change of Gauge Fixed by Charter.—The ordinance of a city authorizing a railway company to construct "and operate a single and double track railway," did not authorize such railway company to broaden the three-foot gauge, fixed by the charter under which the road was built, to a standard gauge, and thereafter operate it as a standard-gauge road.

APPEAL from the Circuit Court of the United States for the District of Colorado.

This is a bill brought by Aldace F. Walker and John

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J. McCook, as receivers of the Atchison, Topeka & Santa Fe Railroad Company, the appellants, against the city of Denver, Marion D. Van Horn, as mayor, and Thomas Foulks, as street commissioner, of the city, appellees, to enjoin the appellees from removing or interfering with a railroad track on Evans street, in the city, which had been converted from a narrow to a standard-gauge railroad track by the appellants, and was being used by them for the purpose of operating a standard-gauge railroad within the city limits. The appellants rest their right to the injunction upon the following facts: On the 16th day of November, 1880, the Denver Circle Railroad Company was incorporated under the laws of the state of Colorado. The charter of the company defines its objects and purposes as follows: "The objects for which our said company is formed and incorporated are for the purpose of locating, constructing, owning, operating, and maintaining a single or double track, three-feet, standard narrow-gauge railroad, with all the necessary side tracks, switches, and turnouts from and in the city of Denver, in the county of Arapahoe and state of Colorado; thence to a point outside the limits of the said city of Denver, and within five miles of the crossing of Lawrence and Sixteenth streets, in said city of Denver; thence, over the most practicable route as shall be located around said city of Denver, within five miles from the crossing of said Lawrence and Sixteenth streets, to an intersection with said route at a point so as to form a continuous belt or track of railroad around said city of Denver, with permission to locate, construct, and operate branch lines of railroad from and to connections with the main line around said city of Denver; and with the further privilege of constructing, maintaining, and operating a railroad of said standard gauge (three feet) to connections with, and to be a part of, said main line, through said city of Denver, and through, along, over, and across the streets and alleys of said city of Denver, in compliance with the ordinances of said city of Denver, and to build all depots, station houses, shops, and other

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buildings necessary for the operation of said railroad and branches."

On the 28th day of January, 1881, the city of Denver passed an ordinance, the provisions of which material to this case are as follows:

"Be it enacted by the city council of the city of Denver:

"Section 1. That the Denver Circle Railroad Company be and the same is hereby authorized to locate, construct, maintain, and operate a single and double track railway and telegraph line, with all necessary side tracks, turnouts, and switches along the following route, when the same runs across public streets, public grounds, highways, or alleys, provided that no side tracks, switches, or turnouts shall be laid on the street crossings. * * *

"Sec. 7. That said company may construct on and over such other parts of said line as they may now own or may hereafter acquire, as many tracks, turnouts, switches, depots, warehouses, machine shops, and other structures for railroad purposes as it may deem proper and expedient, provided that the right of way herein described shall be used for the purposes herein set forth and none other, and the said company shall not grant to any other railroad company the right to use any part of said right of way.

"Sec. 9. That said company, its successors or assigns, are authorized to operate said railroad by steam power. The privileges hereby granted, however, shall be enjoyed, subject to all general ordinances that now are or may hereafter be in force concerning railroads in the city of Denver."

Acting under its charter and the city ordinances, the Denver Circle Railroad Company, in 1881 and 1882, built a single narrow-gauge track railroad on Evans and other streets in the city, which was operated by it until June, 1887, when the same was sold at a foreclosure sale, and purchased by the Denver & Santa Fe Railway Company, a leased line of the Atchison, Topeka & Santa Fe Railroad Company; and, when the

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appellants were appointed receivers of the Atchison, Topeka & Santa Fe Railroad Company, this leased line came into their possession, management, and control, and was operated by them as a part of that system. Afterwards, the appellants, as receivers, desiring to operate that part of the Denver Circle Line on Evans street as a standard-gauge road, proceeded to lay down on that street a third rail, thus making a standard-gauge track over which they ran their standard-gauge equipment used on the Atchison, Topeka & Santa Fe System. The appellees, in their official capacity, being about to take up this third rail, and stop the appellants from operating a standard-gauge railroad on Evans street, this bill was filed to enjoin them from so doing. The lower court denied the injunction, and dismissed the bill.

Charles E. Gast, for appellants.

F. A. Williams (*G. D. Richmond* on brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The charter of the Denver Circle Railroad Company fixed the gauge of its road at three feet. After the appellants came into possession and control of the road, they proceeded, without the consent of the city, to broaden this 3-foot gauge to the standard railroad gauge of 4 feet 8½ inches, by laying down a third rail. Having in this way converted this narrow-gauge into a standard-gauge road, they proceeded to operate it as a standard-gauge road by running over it their standard-gauge rolling stock used on their main line.

The single question presented by the record is whether the appellants, without the consent of the city, could broaden the 3-foot gauge fixed by the charter under which the road was built to a standard gauge, and thereafter operate it as a standard-gauge road, in

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connection with and as a part of their through line to Pueblo. The charter of the Denver Circle Railroad Company defines its corporate powers, and not the city ordinance licensing it to build its road in the city. Its charter emanates from the state, and not from the city. *Chicago City Ry. Co. v. People*, 73 Ill. 541, 548. The company cannot disregard the limitations, express or implied, imposed upon it by its charter. That authorized the construction of "a single or double track, three-feet, standard narrow-gauge railroad." The company was not authorized to construct a road of any different gauge; and, by implication, it was prohibited from doing so. The rights granted by the ordinance of the city to the company to construct "and operate a single and double track railway" empowered it to construct and operate the kind of railway it was authorized to build and operate under its charter, and no other. The charter of the company must be read into the ordinance, and the two construed as one instrument. So construed, the ordinance limited the gauge of the road the company was authorized to build and operate to three feet. The company, therefore, acquired no right or authority from the ordinance to broaden the gauge of its road, and could not lawfully do so without an amendment to its charter, and a further grant or license from the city. Ordinances authorizing obstructions upon the streets of a city, which would otherwise be nuisances, are strictly construed, and must be closely pursued. Any substantial variation from the terms of the grant or license is *ultra vires*. 2 Dill. Mun. Corp. § 657. Such grants are construed most favorably to the public where there exists a reasonable doubt as to the extent of the privileges conferred. *Thomp. Corp.* § 5345. If the company or its successors can convert one of the three-foot tracks it is authorized to build and operate into a standard gauge, it can do the same with the other, and thus appropriate to the use of its tracks three feet five inches more of the street than its charter and the ordinance authorize. More than this, if the claim of the appellants is well founded, they can convert the three-foot gauge of both

tracks into broad-gauge tracks, and occupy still more of the streets, without any further grant or license from the city.

In the view we take of the case, we do not find it necessary to consider the question whether the charter contemplates the construction of a street railroad or a railroad for general traffic. *Williams v. City Electric R. Co.*, 41 Fed. Rep. 557. The charter is for "a continuous belt or track around said city of Denver," "within five miles of the crossing of Lawrence and Sixteenth streets, in said city." Under these provisions of the charter, the road cannot be extended beyond the suburbs of the city; and this fact, together with the gauge of the road, indicates that the road is to be used exclusively for local purposes, and not become a part of a great line of road of standard gauge employed in the transportation of freight and passengers throughout the country. Under the charter and the city ordinance, the gauge of the road cannot exceed three feet, no matter what may be the character of the traffic over it. The appellants have no more right under the charter to broaden the gauge of the road than they have to build a standard-gauge road from Denver to Pueblo. The charter constitutes the index to the objects for which the corporation was created, and to the powers with which it has been endowed. *Thomp. Corp.* § 5639. The change of the gauge and the change of the use of the road by the appellants were a new burden put upon the street without authority. It was the creation of a public nuisance, which it was the right and the duty of the city to abate. The decree of the circuit court is affirmed.

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KANSAS CITY, S. & G. RY. CO.

v.

VICKSBURG, S. & P. R. CO.

(*Supreme Court of Louisiana, Dec. 14, 1896.*)

Expropriation of Railway Property.—The court recognizes that property in use by a railroad company, whether acquired by expropriation or purchase, cannot be expropriated by another, without legislative directions, either expressly or by necessary implication; but in this case the court finds no such use. *Cooley, Const. Lim. p. 539*; *1 Woods, Ry. Law, § 229*; *Evergreen Cemetery Ass'n v. City of New Haven, 43 Conn. 234*; *Toledo, A. A. & N. M. Ry. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564.*

Same.—The necessity to the expropriating railroad corporations of the land proposed to be taken is to be understood in a reasonable sense, with due regard to the needs of the corporation; hence, the directness of the route, the character of the ground, facilities of construction, with other elements of judicious selection and certainty, the ordinance designating the right of any of the corporations, are appropriate guides, exercising the right of expropriation. *Lewis Em. Dom. § 267*; *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co., 82 Ala. 297*; *Mobile & G. R. Co. v. Alabama Midland R. Co. (Ala.) 6 South. 404.*

(Syllabus by the Court.)

APPEAL from parish of Caddo judicial district court. *Affirmed.*

Frank P. Shibbs (*Harry H. Hall*, of counsel), for appellant.

Alexander & Blanchard and *Thomas C. Barrett*, for appellee.

MILLER, J. The defendant appeals from the judgment directing the expropriation of defendant's land, for plaintiff's use. The petition alleges the construction in part by plaintiff of a railroad from Kansas City to the Gulf, by way of Shreveport; that, under agreement with that city, plaintiff has established its machine shops, and has agreed to build a depot within the city limits, for which purpose the

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company has acquired the necessary site. It is further averred that the land sought to be expropriated is necessary for the construction of the road through and from Shreveport and to connect with the company's depots; and with this averment of the necessity of the land for plaintiff's road there is the allegation the land is not required for the defendant's uses. The exception and answer of defendant deny the necessity alleged for the expropriation, and aver the land is part of defendant's right of way for its railroad, is necessary for the transaction of its business, and that, held already under the expropriation by defendant, no second expropriation is authorized. The jury found the issues of fact in plaintiff's favor, and assessed the land damages and betterments at \$3,385; and the judgment, following the verdict, decreed the payment of that amount to defendant. The plaintiff paid the amount into court, proceeded with the construction of its road over the land, and defendant prosecuted this appeal. Rev. St. § 1479-1483.

The plaintiff's road, under the franchises given by the ordinance of the council of Shreveport, is to be constructed from the point of access on a line connecting with the site of its depot, and continuing to the front street of the city, Commerce street, on which the company's tracks already are laid. The defendant's tracks have been laid for years on a part of the line prescribed for plaintiff's road by the city ordinances; that is to say, between Murphy and Common streets, they are laid on land acquired by defendant many years ago; and, the ordinance conferring on plaintiff its franchise for connecting lines in Shreveport, the tracks of plaintiff's road are required to be laid alongside of defendant's tracks, to block 9, *i. e.*, the depot ground of plaintiff. This space between Murphy and Common streets, awarded to the plaintiff, is about 3,000 feet, or, as the verdict gives it, 2.61 acres, and is part of the larger space, from 75 to 150 feet wide, owned by defendant. On this space defendant had but one track, on which it had conducted its business for the years

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since it acquired the property and laid its tracks. In advance of any expropriation proceedings, the plaintiff had caused to be surveyed the space it deemed requisite for its uses, about 35 feet wide, on the southeast side and alongside of defendant's tracks, having still left to defendant considerable space on that side; and, while there is some conflict of testimony, we think it is shown that on the northwest side there is room for another track, and, by filling cuts or "fills," still another track might be laid on defendant's land. As soon, however, as plaintiff had surveyed on the southeast side, defendant commenced the construction on that side of a siding track, and afterwards completed it. The plaintiff thereupon proceeded to survey the space it required further east, still on defendant's land, and within the line prescribed by the ordinance, *i. e.*, alongside defendant's tracks. This second line of plaintiff required all the defendant's land on that side, and, indeed, necessitated the acquisition of other land by plaintiff. About the time of the beginning or completion of defendant's siding on the east side, there were negotiations between the parties for the purchase of the land plaintiff required, or for the lease of the siding track. The defendant demanded \$25,000 for that the jury assessed at \$3,300. Plaintiff refused to accede to the demand, and resorted to this expropriation proceeding. There is in the record a mass of testimony offered to show the feasibility of procuring land for plaintiff's uses without taking that of defendant, and that defendant will need the land. On the other hand, there is an equal mass of testimony controverting that of defendant.

All property is held subject to the right of eminent domain, and one of the conditions of that right is the public necessity for which expropriation is demanded. 2 Kent, Comm. p. 338 *et seq.*; Cooley, Const. Lim. pp. 523, 530, *et seq.*; Const. La. art. 156; Rev. St. § 1479 *et seq.* No question is made that the need of land for constructing requisite connections of plaintiff's railroad is a public purpose or necessity, in legal contemplation. The defendant's

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appreciation of that necessity seems to make the test whether or not the land of others, equally adapted, as it contends, for plaintiff's uses, cannot be obtained. All the testimony seems to concede that the locality at which this land is sought to be taken is within the scope of prudent choice; but it is defendant's contention that land a short distance away from its property should be expropriated. Both roads running through the city of Shreveport have chosen routes over the locality in controversy. We understand the ground is "broken by chasms or fills," to use the term in the record. While defendant's testimony is to the effect that plaintiff can find land as good for its purpose within, say, 200 feet, or a few hundred feet away from that alongside of defendant's tracks, the testimony of plaintiff's witnesses is that to go further east or south would be to encounter deeper fills or chasms and greater difficulties and expense of construction. It is to be observed that defendant, in making its selection of a roadbed through the city, avoided the fills and other difficulties to which it insists plaintiff should submit. We have, too, on this question of the fitness of the land for plaintiff's purpose, the ordinance of the council, prescribing the line alongside of defendant's tracks, and the verdict of the jury, to be deemed an approval of that line. We think the fair conclusion, from all this, is that alongside of defendant's tracks, as specified in the ordinance, is better suited for plaintiff's uses than any land in the radius indicated by the defendant's testimony.

While we have examined this phase of the controversy, it must seem difficult to maintain, as Same. the test of expropriation, that lands of others than the proprietor should be taken. Expropriation, in most instances, is deemed a sacrifice by the proprietor called on to make the surrender. If one proprietor could defeat the expropriation on the ground that the call should be made on another, the supposed compulsion of the law requiring private property for the public good would be of no efficacy. The necessity, in legal contemplation, that is to be the guide in selecting

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land for an unquestioned public purpose, is to be understood in a reasonable sense. There is, of course, the prohibition of excessive appropriation, or the taking of any land not within the scope of the purpose required. Cooley, Const. Lim. 539 *et seq.*; Railway Co. v. Gay, 32 La. Ann. 471. Subject to these restrictions, the law permits the expropriation of property, with due regard to the wants of the expropriating company, measured by the points between which the railroad connection is to be made, the facilities for construction afforded by the ground, the directness of the route, and other points naturally involved in the selection of a roadbed. The question then, is whether, in expropriating, the taking of defendant's land is within this reasonable exercise of the power. It is of weight, on this branch of the case, that defendant, for its route through the city from Red river, chooses its roadbed on the same line, to the extent involved in this controversy, that plaintiff selects for its road through the city. While one road goes through the city from the river northeast to the southwest (that is the general direction), the other proceeds through the city from southwest to the river. Each chooses for part of its line the space under discussion,—enough for both tracks. The judgment of defendant, that of the city council, and the verdict of the jury, all confirm the selection by plaintiff as a judicious exercise of choice. if expropriation gives the power to take that which is reasonably required. If to all this is added the fact that the plaintiff can have no right of way through the city without the consent of the authorities, and seeks only that prescribed by the ordinance, it seems to us that the expropriation sought conforms not only with a reasonable exercise of the power, but is constrained by the exigency of the ordinance of the council. If the right to expropriate the land that is needful for the public purpose carries the limitation of a prudent exercise of the right, the courts must enforce the limitation, but can apply only the tests that are suggested,—a due regard to the wants of the expropriating company, and

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the reasonable fitness of the land to meet such wants. These tests, we think, the record furnishes in support of the expropriation demanded.

The defendant, however, claims its land is now in public use, under the expropriation for that use, and it contends that no second expropriation is authorized. We find no evidence of any expropriation by the defendant. There is no question that this right of eminent domain extends to property already expropriated. When that purpose is announced, it is simply the expression of the legislative judgment that the last public use last proposed is of greater importance than that to which the property is at the time devoted. But, as a rule of interpretation, the expropriation of property in public use, whether under a previous expropriation or other mode of acquisition, will not be deemed the purpose of a legislative act, unless that purpose is avowed, expressly or by necessary implication. *Lewis, Em. Dom.*; *Evergreen Cemetery Ass'n v. City of New Haven*, 43 Conn. 234; *Toledo, A. A. & N. M. Ry. Co. v. Detroit, L. & N. R. Co.*, 62 Mich. 564. The question, then, is whether the land, the subject of this controversy, is in public use. If not, it is subject to be taken for such use, the same as that of any individual. If a corporation acquires more land than it requires for its uses, the land not needed is impressed with no immunity from the exercise of that power to which all must submit. The land involved in this case, part (and a small part only) of a larger space, was acquired by purchase in 1858. In all that long period the defendant has had but one single track on the land. It added another when the plaintiff manifested its purpose to lay its tracks alongside of defendant's. With neither track of defendant does this expropriation propose the least interference. The land proposed to be taken is further east, and devoted to no use whatever by defendant, nor had it ever been, in the half century of defendant's ownership.

There is, however, a great deal of testimony devoted to uses of the defendant for this land not exhibited in

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the past, nor manifest at present, but which, defendant claims, the future will develop. In this connection we have gone through the testimony of the negotiation of defendant with a railroad company seeking a connection with Shreveport. The issue of this negotiation, it was hoped, the witnesses tell us, would have increased defendant's business, necessitating more tracks on its land; but we observe the negotiation came to nothing. Then we have dealt with that part of the record referring to negotiations by defendant with parties in Jefferson, Tex., west of Shreveport, proposing an extension of defendant's line to Jefferson; and this extension, the witnesses claim, would have accumulated business for the road, requiring more trackage. The record shows this negotiation failed, and we note that defendant has extended the lease of its short track west of Shreveport to the company who have had that lease for years,—an extension not in keeping with the Jefferson project. It is also claimed that additional land will be required for yard purposes, which we suppose means space to receive on deposit cotton or freight brought or to be carried by defendant's road: but it appears that space for that purpose has been found elsewhere, and certainly no portion of the 35 feet sought by plaintiff has ever been called in requisition for yard or any other purposes. Along with the testimony as to its prospective uses, we have that of other witnesses, some connected with other railroads leading on to Shreveport, familiar, as they claim, with the requirements of defendant's road in the past, and qualified to predict any such necessity apt to arise in the future. Without recapitulating, it is enough that this speculative testimony as to the future needs of defendant for more land is at least as strong against as for the defendant. We appreciate that, in estimating the land of defendant liable to expropriation, that in actual use should not be the rigid limit, but there should be a reasonable regard for probable increased wants of the owner. But in this case we are confronted with the fact that one track has amply served defendant for

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years; that it has laid another, and has space left reasonably sufficient, if there is any force in testimony, for additional tracks or other purposes. With the tracks on that space, and space besides, it does not seem to us difficult, on any reasonable ground of necessity for defendant's uses, to exclude plaintiff from the 35 feet it seeks of defendant's comparatively much larger extent of ground. It seems to us we must accept the conclusion there is ample ground for both roads, and hence no room for one to deny the expropriation sought by the other. The right of expropriation in such case was well applied in *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.*, 82 Ala. 297.

We have considered, in this connection, the authorities cited by defendant against demands by one corporation for the land of another company. These authorities, arrayed in great number, affirm a principle of general acceptance, and may be dealt with generally. They hold, in substance, that land in public use by one corporation cannot, without legislative authority, in express terms or arising from necessary implication, be taken by another corporation. There can be no controversy about that. Thus, as those authorities maintain, graveyards are shielded from expropriation. A nearer illustration to this case is the station houses or depots of a railroad company, and so, again, ground in use for the purposes of a seaside railroad, though not used for tracks or depots. *Allegheny V. R. Co. v. Pittsburgh Junction R. Co.*, 122 Pa. St. 511; *New York Cent. & H. R. R. Co. v. Metropolitan Gaslight Co.*, 63 N. Y. 326; *Railroad Co. v. Williamson*, 91 N. Y. 552,—and other types of authorities. But here there is no such use, nor any reasonable probability of future use, if testimony is to guide us, or if possible uses can be invoked at all. An impressive fact, too, on this part of the case, that seeks to uphold the alleged use by defendant, and necessity for its needs of this strip of 35 feet, is its offer to sell for an amount in striking contrast with that awarded by the jury. We cannot resist the suggestiveness of the testimony on

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this point. The necessities, present or future, of the land to defendant, we think, would not have assumed the importance indicated in the testimony for defendant, if plaintiff had been willing to give the sum demanded by defendant. An expropriation cannot be declined merely on the ground of price to be paid. The price is left to the jury and the courts, and in this, our conclusion is, was all that defendant could reasonably ask. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

TRUST CO. OF NORTH AMERICA.

v.

MANHATTAN TRUST CO. *et al.**(Circuit Court of Appeals, Eighth Circuit, Nov. 5, 1896.)*

Railway Companies—Leased Station—Lien on Rolling Stock.—A state statute providing that "a landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term" does not apply to the use made of a leased station by a railway company so as to give to the lessor of such station a lien upon the rolling stock of the railway company used in the station in the ordinary operation of the company's trains.

APPEAL from the Circuit Court of the United States for the Northern District of Iowa.

In the year 1889 the Sioux City & Northern Railroad Company built a line of road from Sioux City, Iowa, to Garretson, S. D., a distance of about 100 miles, and on the 1st day of January, 1890, executed a trust deed to the Manhattan Trust Company, complainant in this cause, to secure an issue of first mortgage bonds, which was acknowledged by the grantor on the 22d day of January, 1890, and by the grantee on the 27th day of January, 1890, and was recorded on the 31st day of Janua-

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ry, 1890. The railroad terminal facilities at Sioux City were owned by a separate corporation, organized in 1889, known as the Sioux City Terminal Railroad & Warehouse Company, and this corporation issued its first mortgage bonds as of the same date with the railroad bonds, January 1, 1890, and to secure the same executed its trust deed to the Trust Company of North America, the intervener in this case, on the 1st day of January, 1890, and the same was recorded on the 18th day of January, 1890. The arrangement between the railroad company and the terminal company for the use of the terminals was perfected, and consists of a lease for 100 years, which was executed on the 14th day of December, 1889, and acknowledged on the 21st day of January, 1890, and possession taken thereunder shortly before the 1st of January, 1890. The lease and mortgage were executed at the same time, and with reference to each other. Under this lease the railroad company agreed to pay the terminal company \$90,000 a year rent. The lease provided that out of the \$90,000 the sum of \$75,000 should be payable direct to the Trust Company of North America, to pay the interest on the bonds issued by the terminal company. The mortgage from the terminal company to the Trust Company of North America provided that this \$75,000 rental should be applied in the payment of the interest on the bonds and that the Trust Company of North America should have all the powers and rights for the enforcement of the lease to the extent of the amount of the rental it was entitled to receive, which the terminal company had for the enforcement of the payment of the rent; and provided further that upon default in the payment of rent or in the payment of interest the Trust Company of North America should have all the power which the terminal company had for the enforcement of the provisions of the lease, and should be entitled to all the rents, incomes, and profits of the property. Under the provisions of the lease the rent was payable quarterly, and was paid regularly until September, 1893, when default was made; and, as the railroad

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company was also in default, the Manhattan Trust Company, as trustee in the mortgage to secure the railroad bonds, on the 28th day of September, 1893, filed its bill of complaint asking for the appointment of a receiver for the railroad, but not asking for a foreclosure. Afterwards it filed an amended complaint asking for the foreclosure of its mortgage on the railroad, and thereupon the Trust Company of North America filed an amendment to its petition of intervention previously filed, asking for the first time that its mortgage be declared a prior lien upon a portion of the rolling stock of the railroad company, on the ground that under the statute of Iowa the terminal company had acquired a landlord's lien thereon for rentals under the lease, which lien, it was claimed, was prior in point of time and right to the railroad mortgage. On December 23, 1893, the board of directors of the terminal company, by resolution duly adopted, exercised the right of re-entry reserved in the lease by reason of the default in the payment of rent continued for a period of more than 30 days, and elected to declare and did declare the lease and all rights thereunder forfeited, and made immediate demand upon the Sioux City & Northern Railroad Company and its receivers for the surrender of the demised premises to the lessor. To the amended petition of intervention the Manhattan Trust Company, complainant, made its answer, denying that a landlord's lien attached to the rolling stock of the lessee under the statute, and setting up the nonpayment of the rent under the lease, and the action of the terminal company, through its board of directors, declaring the lease forfeited; and pleaded the statute of limitations of Iowa, which provides that all actions for the establishment of a landlord's lien shall be brought within six months after the expiration of the lease; and averred that the lease had expired more than six months before the filing of the amended petition of intervention. The circuit court held that the terminal company, as the original lessor, had the legal right to forfeit the lease for the nonpayment of rent without

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consulting the Trust Company of North America, mortgagee; and that, having elected to forfeit the lease, the statute of limitations immediately commenced to run, and, as more than six months had elapsed before the filing of the amended petition of intervention, the cause of action was barred. The question whether rolling stock used upon the line of a railroad can be said to be so used within the limits of a terminal depot as to fasten and continue a landlord's lien thereon under the landlord's lien law of Iowa was not decided. *Manhattan Trust Co. v. Sioux City & Northern R. Co.*, 68 Fed. Rep. 72. From the decree dismissing the petition of intervention the Trust Company of North America appealed to this court. In this court the appellant expressly waives any claim to a lien on the rolling stock which was acquired by the railroad company after the complainant's mortgage took effect.

Asa F. Call, for appellant.

Geo. W. Wickersham (*Messrs. Strong and Cadwalader*, on brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The statute relied on by the appellant as giving it a landlord's lien on the rolling stock of the railroad reads as follows :

"A landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term, and not exempt from execution, for the period of one year after a year's rent or the rent of a shorter period claimed falls due; but such lien shall not in any case continue more than six months after the expiration of the term." *McClain's Code, Iowa, § 3192.*

We think this statute is not applicable to this case. The language, "crops grown upon the demised prem-

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ises and * * * any other personal property of the tenant which has been used on the premises," was never intended to apply to the fleeting use made of a terminal or other railroad station by a railroad train employed in interstate traffic. If the legislature had intended to fix a lien on the rolling stock of a long line of railroad running in and out of a leased station, language more appropriate to that purpose would have been used. The rolling stock of the railroad company upon which a lien is claimed under the statute was used for traffic purposes over the whole line of its road, extending into two states, and on connecting lines to the extent that such use is usual and customary among railroads. The rolling stock was not a fixture on the leased premises, and was not "used on the premises" at all, further than to be run in and out of the leased station at Sioux City while being used for traffic purposes over its own and connecting lines. This clearly is not such a use as the statute contemplates as essential to fasten a landlord's lien on the property of the tenant. If the contention of the appellant is sound, and a railroad company should lease half a dozen stations on the line of its road, each lessor would have a landlord's lien on all the rolling stock of the company passing in and out of the leased station, and there would be as many conflicting liens as there were leased stations, with all the litigation, including restraining orders and injunctions, which commonly attends the adjustment of conflicting liens on personal property. Such a condition of things would invite the obstruction of interstate commerce and the carrying of the United States mail, and would otherwise interfere with the public convenience. The purpose for which a railroad is created requires its rolling stock to be kept constantly moving from station to station and from state to state, going and coming in the discharge of the railroad company's duty as a common carrier. This is a very different use of the demised premises from that contemplated by the statute. This view is very much strengthened by the provisions of section 1967 of McClain's Code of Iowa.

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That section relates to mortgages on railroads and declares that "the rolling stock and personal property of the company properly belonging to the road and pertaining thereto shall be deemed a part of the road." This statute would seem to contemplate that the rolling stock shall be attached to the road; not to a part of the road, or to any one station on the road, but to the whole line of road, for the purpose for which the road itself was built.

We have examined the decisions of the supreme court of Iowa to which counsel on either side have referred us. It is not claimed that any of them are in point, and none of them comes near enough to the question in this case to aid us in its solution, and we, therefore, make no reference to them. The conclusion reached on this point in the case makes it unnecessary to decide whether the lessor had a right, under the circumstances, to declare the lease forfeited. The decree of the circuit court is affirmed.

CRONAN

v. .

CRESCENT CITY R. CO.

(*Supreme Court of Louisiana, Nov. 16, 1896.*)

Street Railways—Duty to Passengers—Negligence.—It is the duty of the carrier to convey the passenger safely to his destination. Any want of care on the part of the street-car conductor, resulting in injury to the passenger, will make his principal responsible; but to call a boy passenger to the platform of the car, about to reach his destination, the signal to stop the car given, and the boy called at the right time, will not be deemed negligence of the conductor, charging the carrier with responsibility for injuries to the boy by falling from the platform or car steps, the fall being due to his own imprudence. *Hutch. Carr.* §§ 553 *et seq.*, 665, 666 *et seq.*; *Pennsylvania Co. v. Roy*, 102 U. S. 451; 1 Am. & Eng. R. Cas. 225.

Same—Allowing Boys to Ride on Platform.—The court distinguishes this case from that of negligence implied from allowing

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boys of tender age to ride on platforms of street cars. *Hemmingway v. Railway Co.*, 72 Wis. 42, 33 Am. & Eng. R. Cas. 511; *Railway Co. v. Bohn*, 27 Mich. 510; *Crissey v. Railway Co.*, 75 Pa. St. 86.

Injuries to Child—Contributory Negligence.—The carrier of passengers will not be held responsible for injury to a boy passenger caused by his own imprudence, merely because of his age,—nearly 10 years. *Hutch. Carr.* § 666 *et seq.*, and authorities there cited.

(Syllabus by the Court.)

APPEAL from parish of Orleans civil district court.
Affirmed.

Benjamin Rice Forman and Benjamin Rice Forman, Jr., for appellant.

Farrar, Jonas & Kruttschnitt, for appellee.

MILLER, J. This appeal is from the judgment of the lower court rejecting plaintiff's demand for damages for injuries to his minor son, arising, the petition alleges, from the careless striking or pushing the son

by the conductor of defendant's street-railway car, the son being a passenger, and by that striking or pushing plaintiff's son fell from the car with great force on the stone pavement, sustaining the bruises and other injuries for which the suit seeks damages. The answer is the general issue, and imputes the injuries of the son to his fault and negligence in jumping from the car while in motion. The allegation in the petition is of negligence on the part of the conductor that would, if sustained by testimony, fix liability on the defendant. It is the carrier's duty to carry his passenger safely to his destination, and any carelessness of the conductor in striking, pushing the passenger, or other form of imprudence, whereby he falls from the car and is injured, will make the carrier responsible. *Story, Bailm.* § 593 *et seq.*; *Hutch. Carr.* § 553 *et seq.*; *Pennsylvania Co. v. Roy*, 102 U. S. 451; 1 Am. & Eng. R. Cas. 225; *Steamboat Co. v. Brockett*, 121 U. S. 637. We have therefore given careful attention to this branch of the case. It seems that when the car neared the corner at which the boy was to alight he came to the platform on the signal of the conductor,

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passed, or as he says, "dodged," under his arm, raised to pull the bell rope for giving the requisite notice for stopping to the motorman. The boy testifies he was struck on the shoulder by the arm of the conductor in its descent from pulling the bell rope. A fellow passenger, seated near the door of the car on the side opposite to that on which the boy was to alight, testifies most distinctly the boy had reached the step, fell from it when the conductor's arm was still raised, and was not struck by it. The testimony of the fellow passenger is not marked by the expressions often occurring in negative testimony. He states he had the boy in full view, saw him fall, and saw the conductor's arm raised at the time, and it did not strike the boy. In aid of this testimony it is urged on us that in pulling the bell rope the conductor uses his hand in a direction lateral to the rope, does not move his arm downwards; and, even if downwards, that the slack of the bell rope is not sufficient, considering the height of the rope from the platform, to permit the elbow of the conductor's arm to come in contact with the shoulders of a boy shown to be four feet — inches high. Whatever the force of this argument, it is aided if, according to the testimony of the fellow passenger, the boy was on the step. But, irrespective of the argument based on the position and height of the boy, and the distance of the bell rope from the platform or the step, in the condition of the testimony, to sustain the charge of negligence in striking or pushing the boy, we would have to disregard the very positive testimony of the fellow passenger, and the equally distinct testimony of the conductor, that the boy was neither pushed nor struck. The boy is, doubtless, truthful of his impression. His statement that "he dodged under the conductor's arm, he went to pull the bell rope, and hit him (the witness) in the back, and that is all he knew until he was brought home, lying in bed," etc., puts the boy with his back to the conductor, and we are inclined to think the supposed stroke on the boy's back was an inference; but, how-

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ever regarded, confronted, as the testimony of the boy is, with that of the fellow passenger and the conductor, we are unable to accept the theory of the petition as that of the accident. On this issue of fact, too, the judgment appealed from was against plaintiff, and the record shows, in our opinion, no basis to disturb the conclusion of the lower court on this branch of the case.

The plaintiff conceives that the testimony furnishes a basis of liability of the defendant, although not alleged in the petition, *i. e.*, that the boy was exposed to danger on the platform. The defendant earnestly contends that plaintiff should be restricted to the cause of the injury stated in the petition. We have, however, considered the testimony on which plaintiff relies. The plaintiff brings to our notice the rules of the defendant company for the guidance of its conductors and motormen, one of which rules is that children unattended by their parents will not be permitted to stand on either platform of the car. The plaintiff claims the rule was not observed in this case; that its non-observance caused or contributed to the accident; that there was negligence of the conductor chargeable to the defendant. The law, with reason, exacts of the carrier greater care of the passenger, a child, of tender age, than of an adult. *Hutch. Carr.* §§ 665, 666, *et seq.* The rule simply affirms the prudence enjoined by the law. The child, in the language of the text writer, should not be permitted to occupy positions of danger, nor otherwise expose himself to injury, at least without warning. The cases illustrating this are cited by the text writer and by plaintiff. In *Crissey v. Railway Co.*, 75 Pa. St. 83, the boy, 13 years old, was permitted to ride on the platform of the car, with no admonition or objection from the conductor, and announcing his purpose loud enough for the conductor to hear, the boy stepped off the car while in motion, was dragged by it, and was injured. The case cited, *Ridenhour v. Railway Co.*, 102 Mo. 270, we have not examined, and presume it is of the type indicated in the text book. In *Railway Co. v. Bohn*, 27 Mich. 510,

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the child was permitted to ride on the platform, fell off, and was injured. In *Hemmingway v. Railway Co.*, 72 Wis. 42, 33 Am. & Eng. R. Cas. 511, the car passed the station, the destination of a boy passenger, it being intended the train should return to that station, but the boy, ignorant of this intention, jumped from the moving train, and was injured. *Hutch. Carr.* §§ 665, 666, *et seq.* In the first of these cases, the appellate court set aside the verdict directed by the lower court, and held the question of negligence should have been submitted to the jury. In the cases from 27 Mich. and 72 Wis., the defendant carriers were held liable, in the one case because the conductor permitted the children to ride on the platform, a position of danger, and in the other because the child was not told the car was to return after passing the station. In this case the boy's account is, when he got between South and Lafayette streets, the conductor signaled him to come to the platform, saying, "The next corner is yours." The boy states he dodged under the conductor's arm; that when he went to pull the bell he hit him (the boy) on the back, and he adds that is all he knew until he found himself at home in bed. We gather from the other witnesses that when the car got to South street, the boy's destination, the motorman motioned the boy to the platform, that he left his seat, came out, and as the conductor put his hand on the bell to pull it, and before he had time to pull, the boy had fallen off the car. The testimony to this effect comes from a fellow passenger, and, to some extent at least, is supported by that of other passengers and the conductor. It seems to us the case is distinguished from that in which the boy passenger is permitted to ride on the platform. To use the platform in lieu of the seats inside during the course of the transportation is not the same as calling the boy to the platform when the car is about stopping at his destination. The boy was in his seat when called,—until called to alight. We do not understand it to be questioned that the stop signal was made and the boy called at the right time, and he had to come to the

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platform to alight. His fall after he got there, not caused by the push of the conductor, as charged in the petition, must, in our view, have resulted from his missing his footing on alighting from the car before it came to a full stop. The evidence submitted compels the conclusion the fall was due to his imprudence.

It is urged on us, however, that negligence is not imputable to children of tender age. It is, however, equally true that carelessness in children who are of

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ligence. age sufficient to exercise discretion for the avoidance of injury to themselves when traveling in street cars is recognized. Hutch.

Carr. § 666 *et seq.* The law does not fix this age of discretion. All that we have before us on this branch of the case is that the parents of the boy deemed him old enough to travel by himself, and the fact he was nearly 10 years of age. If, as we hold, he was not exposed to peril, and could have left the car with safety using ordinary care, we do not think the defendant can be held liable merely and only because of the boy's age. Neither reason nor the authorities exact that the carrier of passengers shall anticipate and guard against injuries which ordinary prudence would avoid, and that prudence, it seems to us, is not dispensed with on the part of a boy placed on the car by his parents, and of that intelligence usual to the age of 10. We cannot, therefore, on this ground,—that his age, in effect, made his imprudence the neglect of the conductor,—hold defendant liable.

We have given attention to the case in all its aspects, and to the authorities cited by plaintiff, and our conclusion is the defendant cannot be adjudged responsible for the accident. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed, with costs.

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YOUNG

v.

CHICAGO, M. & ST. P. R. Co.

(*Supreme Court of Iowa, Dec. 12, 1896.*)

Boarding Moving Car.*—Where a state statute provides that no person shall get on an engine or car, stationary or in motion, upon a railway track, unless in so doing he shall be "acting in compliance with law, or by permission, under the lawful rules and regulations of the corporation then owning and managing such railroad," the plaintiff in an action against a railway company to recover damages for injuries received while boarding a moving train can not recover unless he shows that in boarding the train he was "acting in compliance with law, or by permission, under the lawful rules and regulations of the" defendant company.

Same—Invitation of Conductor.—If in so doing the plaintiff acted by the permission or direction of the conductor in charge of the train, in order to recover he must show that such permission or direction was under the lawful rules and regulations of the defendant company.

APPEAL from Guthrie county district court. *Reversed.*

This is an action for damages which plaintiff claims to have sustained because of injuries received while attempting to board a moving train of the defendant company at Kirkland, Ill. Plaintiff was a resident of Yale, Iowa, and was shipping four cars of live stock from his home to Chicago, Ill. He was accompanying said stock, and was riding on a shipper's pass. As the train slowed up at Kirkland, plaintiff claims the conductor advised him that they would have 15 minutes at Kirkland for lunch, and also stated that there was a lunch counter there. Plaintiff

Case Stated.

**Note.*—See *Omaha St. R. Co. v. Martin*, 48 Neb. 65, 4 Am. & Eng. R. Cas. N. S. 1; *Cicero, etc., R. Co. v. Meixner*, 160 Ill. 320, 4 Am. & Eng. R. Cas. N. S. 246; *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28, 5 Am. & Eng. R. Cas. N. S. 393; notes 3 Am. & Eng. R. Cas. 431; 47 Id. 541; 52 Id. 284; 2 Rap. & Mack's Dig. 453.

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claims he got out of the caboose, and, with others, entered the lunch room, and shortly thereafter the train was seen to move; whereupon some one asked the conductor if the train was going, and he replied, "Yes; better get on; the train was going," or "Get on the train, if you don't want to get left," or something to that effect. Whereupon plaintiff hastened from the lunch room, and ran to the rear of the train, which, he testifies, was going at from three to four miles an hour, and attempted to climb on the rear platform of the caboose. In making the attempt, and while having hold of a car, a jerk, as he claims, of the train, loosened his hold, and he fell on the rails, breaking and otherwise injuring his teeth, and inflicting other injuries. The defendant pleaded a general denial, and that the accident was caused by plaintiff's negligence; also a statute of the state of Illinois prohibiting passengers from mounting moving trains. A trial was had to a jury, which returned a verdict for plaintiff in the sum of \$125. Judgment was entered upon the verdict, from which defendant appeals.

E. W. Weeks and Wright & Baldwin, for appellant.
S. D. Nichols, for appellee.

KINNE, J. 1. Our conclusion in this case requires the consideration of but one question, which we deem decisive of plaintiff's rights. The defendant pleaded a statute of the state of Illinois which provides: "No person or minor shall climb, jump, step, stand upon, cling to or in any way attach himself to any locomotive engine or car, either stationary or in motion, upon any part of the track of any railroad, unless in so doing he shall be acting in compliance with law, or by permission, under the lawful rules and regulations of the corporation then owning and managing such railroads." Hurd's Rev. St. 1891, c. 114, § 79. Another section provides for the imposition of a fine for a violation of the act. *Id.* § 81. Plaintiff cannot recover in this action if his own negligence contributed to produce the injuries of which he

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complains. If such injuries were received as a direct result of a violation of the statute of the state of Illinois, then it must be held that his act in attempting to mount the moving train was, as a matter of law, negligence, which precludes his recovery. One may not be guilty of contributory negligence who receives an injury while he is engaged in an act in violation of law. *Gross v. Miller*, (Iowa) 61 N. W. 385; *Schmid v. Humphrey*, 48 Iowa 652; *Van Horn v. Railway Co.*, 63 Iowa 68.

The test is, was the unlawful act the proximate cause of the accident or injury? If so, he cannot recover. *Beach, Contrib. Neg.* §§ 45-47; 4 *Am. & Eng. Enc. Law*, p. 50; *Gross v. Miller* (Iowa) 61 N. W. 385. In other words, if there was such a relation or connection between the accident and the act of violating the statute of the state of Illinois, on part of the plaintiff, as to cause or help to cause the accident, then he was guilty of contributory negligence as a matter of law. *Gross v. Miller* (Iowa) 61 N. W. 385; *Van Horn v. Railway Co.*, 63 Iowa, 68; *Schmid v. Humphrey*, 48 Iowa, 652; *Gribble v. City of Sioux City*, 38 Iowa, 390. It is said in *Herman v. Railway Co.*, 79 Iowa, 162, in speaking of an instruction: "This instruction is conceded to be correct, because, by section 2, c. 148, Laws 16th Gen. Assem., it would have been a misdemeanor for plaintiff to jump from the train while it was in motion, and under such a state of facts, the law would conclusively presume that the injury was the result of his own negligence." The statute in this state relating to getting on and off moving trains is in substance like that of Illinois, above quoted. In *Raben v. Railway Co.*, 74 Iowa, 732, it was, in effect, held that, under the statute of this state, if the act of an injured party in getting off of a train was a misdemeanor, she could not recover. The same rule is recognized in *Galloway v. Railway Co.*, 87 Iowa, 466. The failure to comply with a duty imposed by statute or ordinance is usually held to be negligence as a matter of law. *Smith v. Traders' Exchange* (Wis.) 64

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N. W. 1041. This might be otherwise if the act of the one who inflicted the wrong was wantonly or willfully done. Unless, then, plaintiff has shown that, in attempting to mount the moving train, he was "acting in compliance with law, or by permission, under the lawful rules and regulations of the" defendant company, his act will prevent his recovery.

2. The claim of plaintiff is that he had the "permission of the conductor of the train, or, being directed by him (which amounts to the same thing), had a right to infer that he was acting in compliance with the rules and regulations of the defendant company." There is nothing in the record to show what the "lawful rules and regulations" of the defendant were. It cannot be assumed that they were such as to authorize trainmen to advise passengers to violate a law of the state, especially when such violation was likely to be followed by an injury to the passenger. Nor do we agree with counsel for the plaintiff that it was incumbent upon the defendant to plead and prove these rules and regulations. Plaintiff was *prima facie* acting in violation of the law in attempting to board the moving cars. If he was, in so doing, acting in compliance with law, or by permission, under the lawful rules and regulations of the defendant, it was incumbent upon him to establish that fact. He has not done so, and, it seems to us, is in no position to recover until he, by proper proof, brings himself within the provisions of the statute which excuse his act in attempting to mount the moving cars. This court said, in the Raben Case: "The burden was on plaintiff to prove that the circumstances of the occurrence were such that she was entitled to recover for the injury she sustained, and the question of her right to recover depends upon whether her own act was lawful. It follows, necessarily, that she is not entitled to recover without proof that she was acting lawfully at the time." Our conclusion renders it unnecessary that we consider other questions argued. Reversed.

Same—Invitation
of Conductor.

Distler v. Long Island R. Co.

DISTLER

v.

LONG ISLAND R. CO.

(*Court of Appeals of New York, Jan. 19, 1897.*)

Boarding Moving Train—Negligence.—A person, in compliance with the direction of the conductor, attempted to step on board of a train moving past a platform at the rate of two or three miles an hour, and was thrown and injured by the sudden starting of the train. *Held*, that he was not negligent *per se*, but that the question of his contributory negligence and of the negligence of the railway company were questions of fact for the jury.

Same—Proximate Cause.—The stepping on the moving train could not, as a matter of law, be held the proximate cause of his injury.

APPEAL from supreme court, general term, Second department. *Reversed.*

F. R. Gilbert, for appellant.

W. C. Beecher, for respondent.

MARTIN, J. This action was to recover damages for personal injuries alleged to have been caused by the defendant's negligence. On the 21st day of June, 1892, the plaintiff was at Manhattan Crossing, awaiting a train by which to reach Deer Park. Manhattan Crossing is a regular station upon the defendant's road, where all its trains stopped going east. After remaining a short time, a train arrived going in an opposite direction, when the plaintiff inquired of the conductor the time of the next train going to Deer Park, who replied that he would return with his train in 30 or 35 minutes and stop for him. The train returned, and while passing slowly along the platform, at the rate of two or three miles an hour, the conductor bade the plaintiff get on. At the time the plaintiff was on the

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station platform, and, in compliance with the direction of the conductor, stepped upon the steps leading to the forward platform of the second car, passed on until one foot was upon the platform and the other was upon the first step below, when the train started with a sudden jerk or lurch, which threw him from the car, and he was seriously injured. When the plaintiff rested, the defendant moved to dismiss the complaint upon the grounds that no negligence on its part had been proved, and that the plaintiff was guilty of contributory negligence. The motion was granted. The plaintiff then asked the court to submit the case to the jury upon the facts established by the evidence, which was denied on the ground that the plaintiff was guilty of contributory negligence, as a matter of law. To that ruling the plaintiff duly excepted. In making it the court apparently relied solely upon the case of *Hunter v. Railroad Co.*, 126 N. Y. 18; 47 Am. & Eng. R. Cas. 534. The question to be determined in this case is whether, as a matter of law, the plaintiff was guilty of contributory negligence in getting onto the train, in pursuance of the direction of the conductor, while it was moving at the rate of two or three miles an hour, when there was nothing to indicate any unusual or peculiar danger. Inasmuch as the decisions of the trial court and general term seem to be based upon the *Hunter Case*, it is proper to examine the decisions of this court in that case, to ascertain whether the principle there decided upholds the determination of the courts below.

When the *Hunter Case* was in this court on the first appeal, it was reversed upon the ground that the plaintiff was guilty of contributory negligence in boarding a train moving at the rate of from four to six, or six to eight miles an hour, although he was within three or four feet of an elevated freight platform, which was only about six inches from the side of the moving car. The opinion on the first appeal discloses that the decision was then based chiefly upon the rapidity with which the train was moving

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when the intestate attempted to get on; the court, in effect, holding that to board a train moving from four to six, or from six to eight, miles an hour, was so dangerous and hazardous that it must be regarded as negligence, as matter of law, notwithstanding the conductor directed him to do so. At the same time it recognized the fact that there were cases in which an attempt to get off or on a moving train would not be regarded as negligence *per se*, and where the question of negligence, upon all the facts, should be submitted to the jury. When the case was in this court upon a second appeal, it appeared by the record that there had been a change in the evidence, so that the train was described as moving at the rate of from one to two, instead of from four to six, or six to eight, miles an hour. The court reversed the judgment upon the ground that the plaintiff's intestate was negligent, and that his act contributed to his death. This conclusion seems to have rested principally upon the presence of an elevated freight platform in close proximity to the place where the intestate attempted to board the moving car, so that, in case of a misstep or other slight accident, his injury from contact therewith was almost, if not absolutely, certain. The court, however, again recognized in its opinion the existence of cases where an attempt to board or alight from a moving train would not be regarded as negligence, as a matter of law, but stated that that was not one of those cases. I think it may be said of the decisions in that case that in the first it was held that it was negligence *per se* to board a train moving from four to six, or six to eight, miles an hour, on account of its comparatively rapid motion; and, in the second, as the danger was manifest, unusual, and peculiar, and must have been seen and understood, that, although moving at a less rate of speed, it was negligence, as a matter of law, to attempt to board it while in close proximity to a prominent obstruction, so situated that in case of failure, or of a misstep or other slight misadventure, the risk of being thrown against the ob-

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struction and injured would be imminent. It is obvious that the facts upon which the decisions in the Hunter Case were based are essentially unlike those in the case at bar. Upon the first appeal in that case the train was shown to have been moving at a rate of speed greatly in excess of that at which a person would ordinarily walk, and in the second the proof was that, while the train was moving less rapidly, still the attempt to board it was manifestly attended with such peculiar and certain danger from surrounding obstacles as to make it negligence to do so. Neither of those conditions exists in this case. Here the train was moving at a rate of speed not greater than an ordinary walk. There was a long platform at the station, unobstructed, with nothing to indicate that any unusual danger was to be apprehended in stepping upon the train. Thus, it is apparent that the Hunter Case is plainly distinguishable from the case at bar, and that the decisions in that case do not sustain the determination of the courts below. Unless this court shall hold that it is negligence *per se* to step upon a moving train, no matter how slight its motion, this judgment cannot be upheld. We think the decisions in the Hunter Case have gone to the fullest limit to which this principle should be extended. It is a matter of common knowledge that it is of daily occurrence that ordinarily prudent persons safely board a train or car moving at two or three miles an hour. We are not prepared to hold that it is negligence *per se* to step upon a train moving at that rate of speed. To do so would encroach upon the proper province of a jury. There is another distinction between this and the Hunter Case. In this case the proof discloses that the conductor was in entire charge of the train, as the representative of the defendant. When the train first passed, he informed the plaintiff that upon his return he would stop, so he could take the train to Deer Park. He doubtless had authority to make that agreement. In pursuance of it, the plaintiff remained at the station until the train returned, when, while the train was

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going at a rate of speed which appeared to render it reasonably safe, he complied with the direction of the conductor, and boarded it. We are not prepared to hold that, under those circumstances, the direction of the conductor was of no importance. While it was held in the Hunter Case that such a direction was unimportant where it was manifest that to comply with it was imminently dangerous, yet here, as no such condition existed, that principle has no application.

There is another ground upon which we think the judgment should be reversed. Even if it were assumed that the plaintiff was negligent in stepping upon a moving train, yet it cannot be held, Same-Proximate Cause. as a matter of law, that such negligence, in any proper sense, contributed to his injury. The danger which attended the boarding of a moving train had been passed. The plaintiff was upon the train, and in a situation of safety, unless there was an accident, or some mismanagement. His injury can hardly be said to be the proximate result of stepping upon the moving train, or to have been occasioned by his inability to safely reach a seat because the car was in motion. The direct and proximate cause of his injury was the mismanagement of the train, causing a sudden jerk or lurch which threw the plaintiff therefrom, or at least the question whether that was the cause was a question of fact for the jury. We are of the opinion that the questions of the defendant's negligence, and the plaintiff's freedom from contributory negligence were, under the evidence, questions of fact, and should have been submitted to the jury. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, J. (dissenting). I dissent from the conclusion reached by the majority of my associates, because, in all the main and material facts, this case cannot be distinguished from the Hunter Case, 112 N. Y. 371, 37 Am. & Eng. R. Cas. 74 ; *Id.* 126 N. Y. 18, 47 Am. &

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Eng. R. Cas. 534,—which in turn rested upon the principle decided in the Solomon Case, 103 N. Y. 437, 27 Am. & Eng. R. Cas. 155. This train was a special train, which was not scheduled to stop at the station, and upon which the plaintiff had no right to be carried. The plaintiff elected to leave his place of safety, and to incur the peril of boarding a moving train, for some purpose of convenience, upon the invitation of his friend, the conductor of the train. These were also the facts in the Hunter Case, upon consideration of which this court determined that the plaintiff was guilty of contributory negligence, and, therefore, should have been nonsuited. The distinction attempted now to be made between the cases does not amount to a substantial difference. It seems to me that, in making this distinction, we are unnecessarily introducing uncertainty in the law for the government of trial courts in negligence cases.

ANDREWS, C. J., and O'BRIEN, BARTLETT, and VANN, JJ., concur with MARTIN, J., for reversal. GRAY, J., reads for affirmance, and HAIGHT, J., concurs.

Judgment reversed.

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PEOPLE *ex rel.* CANTRELL

v.

ST. LOUIS, A. & T. H. R. CO.*

(*Supreme Court of Illinois, Jan. 17, 1896.*)

Carriers of Passengers—Duty to Furnish Proper Trains—Mandamus.—The operation of a separate passenger train is an act sufficiently specific to be enforced by *mandamus*. And a railroad may be forced to operate a passenger instead of a mixed freight and passenger train upon a branch running through fifty miles of populous country if its earnings justify the expense. In determining this question the net earnings of the whole road are to be considered, and not merely those of the branch in question, where the company does not keep separate accounts for its main line and the branch.

Same—Preferred Stock.—In estimating the liabilities of such road, the preferred stock of the company will not be considered a debt.

APPEAL from Franklin county circuit court. *Reversed.*

This is a petition for a writ of mandamus in its amended form, presented in the name of the people of the state of Illinois, at the relation of William S. Cantrell, a citizen and property owner of Benton, Franklin county, Ill., as the patron of the defendant railroad company, the prayer of which petition is as follows: "That a writ of mandamus be issued, delivered to the St. Louis, Alton & Terre Haute Railroad Company, commanding it to cause to be furnished, placed, run, and operated, on said railroad, extending from Eldorado to Duquoin, a daily (Sundays excepted) passenger train, each way, suitable and sufficient to carry all passengers, with their necessary baggage, in comfortable and reasonable security, and at a reasonable speed, and to operate said line of railroad from East St. Louis to Eldorado as a continuous line ;

Case Stated.

*See notes at end of case.

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and that, upon final hearing hereof, such further order be made in the premises as to the court shall seem meet and proper." The petition was answered by the respondent railroad company. A replication was filed to the answer, except as to one paragraph thereof which was demurred to, and the demurrer sustained. A jury was waived, and the cause submitted by agreement for trial before the circuit judge without a jury. The trial judge rendered judgment refusing the prayer of the petition, and dismissing the same, from which judgment the present appeal is prosecuted. A large amount of testimony, oral and documentary, was introduced upon the hearing, including reports of the respondent company to the railroad and warehouse commissioners, the charter of the Belleville & Eldorado Railroad Company (as found on pages 485, 486, and 487 of the Private Laws of 1861), and the lease executed by the Belleville & Eldorado Railroad Company to the respondent in 1880. The petition avers that the railroad of the Belleville & Eldorado Railroad Company is the only railroad in Franklin county, and also contains the following averments: "That on or about December 1, 1893, numerous citizens of said towns of Benton, Eldorado, Christopher, Mulkeytown, Thompsonville, and other towns along said line of railroad, presented petitions to the said railroad and warehouse commission of the state of Illinois, complaining of the train service on said railroad extending from Eldorado to Duquoin, and setting forth the alleged facts relating thereto, and asking said commission to take cognizance of their complaint, and by appropriate order or orders, or by appropriate suit or suits, compel the said St. Louis, Alton & Terre Haute Railroad Company to run its trains through from St. Louis to Eldorado as one continuous line, and run a daily through passenger train, with appropriate connections with other trains at Duquoin and Eldorado, and give the public such further relief in the way of train service on said railroad as justice and right demand. That thereupon said commission gave notice to said railroad company of the presentation of

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said petition, and such action was thereupon afterwards taken and had by said commission that on January 9 and 10, 1894, a hearing was had at Benton on said petition, at which time and place said railroad company was present, and represented by its president, Hon. George W. Parker, and its counsel, F. M. Youngblood, and said petitioners were represented by Hons. C. H. Layman and D. R. Webb; and thereupon, after hearing and considering the evidence introduced by the petitioners and said company, the said commission made and promulgated the following order or recommendation in the premises, to wit: 'We therefore recommend to you, the St. Louis, Alton & Terre Haute Railroad Company, that you, without delay, cause to be placed and operated on the Belleville & Eldorado Division of your road, in addition to the mixed train now being operated by you on said line, a daily passenger train, suitable and sufficient to carry all passengers with their necessary baggage, in comfort and security, and at a reasonable speed, and that you operate your said railroad from East St. Louis to Eldorado as a continuous line, so that persons desiring to leave Eldorado and intermediate points in the morning of each day (Sunday excepted) may be able to go on said railroad to East St. Louis and return the same day.' That said St. Louis, Alton & Terre Haute Railroad Company has wholly neglected to comply with said order, or follow said recommendation, but, on the contrary, refuses to comply therewith, and yet continues to run its said train as before, and still fails to accommodate the traveling public." Such other facts, set up in the pleadings and developed by the proofs, as are necessary to an understanding of the questions involved, are sufficiently stated in the opinion.

M. T. Maloney, Atty. Gen., *H. J. Hamlin*, and *A. W. O'Hara*, for appellant.

J. H. Mulkey, and *F. M. Youngblood*, for appellee.

MAGRUDER, J., (after stating the facts). The main question in this case is whether a railroad company can be compelled by mandamus to run a passenger train.

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The appellee operates about 50 miles of railroad running from Duquoin easterly to Eldorado, which it leased in 1880, for 985 years, from the Belleville & Eldorado Railroad Company; and it is conceded that it runs no passenger train—that is, no train for passenger service, exclusively—over this distance of 50 miles, between Duquoin and Eldorado. On Sunday and Monday evenings, a train consisting of a baggage car and one passenger coach runs from Duquoin easterly to Benton, about 18 miles, returning from Benton to Duquoin the next morning, about 4 o'clock; but the only train which runs the whole length of the branch road, between Duquoin and Eldorado, is what is called a "mixed train," consisting of coal, stock, and freight cars, to which are attached a combination car and passenger coach. This mixed train leaves Duquoin daily at 11 o'clock a. m. for Eldorado, and, returning in the afternoon, arrives at Duquoin at 7:10 p. m. Appellee runs through trains from St. Louis, by way of Belleville, to Duquoin; but the mixed train in question does not connect at Duquoin with any of the passenger trains run by appellee from Duquoin to St. Louis, nor at Eldorado with any of the trains upon the Cairo Division of the Cleveland, Cincinnati, Chicago & St. Louis Railroad, or the Shawneetown Branch of the Louisville & Nashville Railroad. Passengers for St. Louis, or points west of Duquoin, must remain over night at Duquoin, and take the train next morning, at 4:50 o'clock. This mixed train carries freight, express, baggage, stock, mail, and passengers. On account of the freight carried and handled, it is a slow train, being often behind its schedule time from 20 minutes to 3 hours. During the busy shipping season, it often has to be cut in two on the grades, one part going forward to a switch, and returning for the balance of the train, including the passenger coach. At Eldorado the entire train is often pushed in front of the engine down to the depot. When the mixed train goes east, the passenger coach, which is used by all classes of passengers, both

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ladies and gentlemen, is between the freight cars and the combination coach. The mixed train has two brakemen, is operated by hand brakes, and has no air brakes. The regular passenger trains on the other parts of the road are equipped with air brakes operated from the engine. The roadbed is a dirt ballast, and the passenger car on the mixed train is dirtier and dustier than the passenger cars on the west end of the road. There is often an odor from the stock cars ahead of the passenger coach. It is bad for ladies and children. The stock cars are frequently filthy and offensive, from the manure in them. The train is often delayed at the station, to take on and deliver freight. It is subject to jars that stagger the passengers. Much switching is done, and, when switching is done at a station, the passenger coach is usually uncoupled; and passengers must wait while the cars are loaded with stock, cattle, and hogs, and are often inconvenienced by the gang planks thrown out. The country through which the mixed train passes is a farming country, and well settled. The products shipped are mostly grain, mill products, and live stock, and the freight distributed along the line is merchandise. St. Louis seems to be the commercial center for that part of the state. Of the counties through which the mixed train runs, Franklin county has a population of 17,138, Perry county 17,259, Saline county 19,342; and, of the towns along the line of the road, Duquoin has a population of about 5,000, Benton 1,200, Eldorado 2,000, Galatia 800, Thompsonville 500, Raleigh 500, Christopher 200, Mulkeytown 200. Improved lands in that section are worth from \$20 to \$50 per acre. Such being the character of the mixed train, and such being the character and population of the territory through which the mixed train runs, ought the appellee to be required to furnish the people with a passenger train? The question is not whether appellee should run more than one train, but the question is whether it does all that it is required to do when it runs a passenger coach attached to a freight train, or whether it is its duty to run one or

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more passenger coaches, separate and disconnected from freight cars, for the accommodation of passengers only, and not of passengers in connection with shippers.

When it is sought by mandamus to compel a railroad company to do any act in relation to the equipment and operation of its road, the courts, as a general rule, will not interfere with its management of its railway in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted. *People v. Chicago & A. R. Co.*, 130 Ill. 175, 40 Am. & Eng. R. Cas. 352. Whether or not the people are here entitled to relief by mandamus against the appellee company must be determined by the answer to the inquiry whether the act sought to be enforced is specific, and whether the right to a performance of that act is clear and undoubted. There can be no doubt about the clear legal duty of the appellee to operate the railroad from Duquoin to Eldorado, leased by it from the Belleville & Eldorado Railroad Company. The act of February 12, 1855, to enable railroad companies to enter into corporate contracts, and to borrow money, authorized railroad companies organized under the laws of Illinois to make contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof. 2 Starr & C. Ann. St. p. 1921. In case of a lease by one railroad company to another, the lessee assumes the rights, franchises, and obligations contained in the charter of the lessor, and must conform to the requirement of said charter. 1 Ror. R. R. p. 610; 19 Am. & Eng. Enc. Law, p. 897. "And, when one company leases its road to another, the lessee must, in operating it, be governed by the charter of the lessor." *City of Chicago v. Evans*, 24 Ill. 52. When, therefore, the appellee leased the road in question from the Belleville & Eldorado Railroad Company, it assumed the charter obligations of the latter company, and agreed to conform to its charter requirements. Section 1 of the act to incorporate the Belleville & Eldorado Railroad Com-

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pany, in force February 22, 1861, declares that the company "shall possess all the powers * * * necessary to carry into effect the objects and purposes of this act, which is to lay out, build, construct, equip, complete, and continue in operation a railroad from Belleville; in St. Clair county, by way of Benton, in Franklin county, and Galatia and Raleigh, and to Eldorado, in Saline county; * * * and they may make connections with any railroad on the line, or at either terminus, on such terms as may be mutually agreed upon between the parties." Priv. Laws Ill. 1861, p. 485. Section 4 of the act provides that "said company shall have power, when, in their discretion, they have a sufficient amount of capital stock subscribed, to proceed to lay out, locate, construct, build, equip, complete, and operate their road." Id. p. 486. It will be noticed that the charter of the Belleville & Eldorado Railroad Company provides for the construction, equipment, and operation of a railroad "from Belleville, in St. Clair county, by way of Benton, in Franklin county, and Galatia and Raleigh, and to Eldorado, in Saline county." As matter of fact, however, the Belleville & Eldorado Railroad Company never constructed a road from Belleville to Eldorado. It constructed a road about 50 miles long, from Eldorado to Duquoin, in Perry county, the latter place being distant more than 56 miles from Belleville; and as soon as the road between Duquoin and Eldorado was finished, and on July 1, 1880, it leased the latter road to appellee. At that time, appellee owned and operated a railroad running from East St. Louis, opposite St. Louis, to Belleville, a distance of a little more than fourteen miles, and, prior to that time, had leased for a long term of years the railroad of the Belleville & Southern Illinois Railroad Company, running from Belleville to Duquoin, and was then operating the entire line from East St. Louis to Duquoin as one road, commonly known as the "Cairo Short Line." The lease made on July 1, 1880, by the Belleville & Eldorado Railroad Company to appellee, recites the owner-

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ship by appellee of the road from East St. Louis to Belleville, and its lease of the road from Belleville to Duquoin, and its operation of the two as one line, and also recites the completion of the road from Duquoin to Eldorado, and that it is deemed and considered for the mutual interest of the parties hereto [the Belleville & Eldorado Railroad Company and appellee] that said roads [the three roads] should be placed under the same management and operated as one line; and, to that end, the party of the second part [appellee] has agreed to lease from the party of the first part [the Belleville & Eldorado Railroad Company] its railroad from Duquoin to Eldorado," etc. It thus appeared from the recitals of the lease of July 1, 1880, that the object of that lease was to so connect the road from Duquoin to Eldorado with the roads from East St. Louis to Belleville, and from Belleville to Duquoin, as that the three roads could be operated as one line. And so, although the Belleville & Eldorado Railroad Company did not construct a road from Belleville to Eldorado, as its charter provided, yet, by the connection thus made with the road leased by appellee which ran from Belleville to Duquoin, it became a part of a continuous road from Belleville to Eldorado, the terminal points named in its charter. As the Belleville & Eldorado Railroad Company, the lessor company, was bound to equip and operate its road, the appellee, the lessee company, was also bound to equip and operate the leased road. "Equipment," as applied to railroads, has been defined to be "the necessary adjuncts of a railway, as cars, locomotives." *Rubey v. Mining Co.*, 21 Mo. App. 159; 6 Am. & Eng. Enc. Law, p. 655, note 6. Section 12 of article 11 of the constitution says: "Railroads heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." 1 Starr & C. Ann. St. p. 163. It follows that the obligation to equip and operate and continue

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in operation the leased road involved the obligation to furnish and use cars and locomotives for the transportation of persons and property ; that is to say, for the carriage of both passengers and freight.

Section 22 of the act of this state in relation to fencing and operating railroads provides (2 Starr & C. Ann. St. p. 1940) that "every railroad corporation in the state shall furnish, start, and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroad and at the junction of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freight." It is claimed, however, in behalf of appellee, that, while it is obliged to furnish cars for the carriage of passengers, yet it is not necessarily obliged to carry passengers upon a separate passenger train, and that it has the right to exercise its own discretion as to the manner of their transportation. The discretionary power of railroad companies in this respect is subject always to the condition that there is no statutory provision limiting and restricting such power, and that its exercise is not opposed to the terms of the charter. *People v. Chicago & A. R. Co.*, 130 Ill. 175 ; 40 Am. & Eng. R. Cas. 352 ; *Mobile & O. R. Co. v. People*, 132 Ill. 559 ; 42 Am. & Eng. R. Cas. 671 ; 2 Mor. Priv. Corp. (2d Ed.) § 1119. This discretion is also subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. *People v. Chicago & A. R. Co.*, *supra*.

Counsel for appellant rely upon articles 1 and 6 of the lease of July 1, 1880. Article 1 is as follows : "The party of the second part shall have, possess, and operate the said railroad from Duquoin to Eldorado for and during the term hereinbefore mentioned, upon the terms and conditions herein set forth, and shall at all times during the continuance of this lease furnish all necessary rolling stock and equipment for the complete and perfect operation of the said demised railroad."

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And in the sixth article the defendant company covenants as follows: "The said party of the second part shall and will, during the term hereby granted, operate, maintain, and keep in good repair, the railroad and premises hereby demised, and shall from time to time make all necessary additions and improvements, and shall and will indemnify and save harmless the said party of the first part, its successors and assigns, from and against all costs, charges, and expenses, damages, and liabilities whatsoever growing out of the maintaining, repairing, operating, or using of the said road." Thus, by the terms of the agreement made for the connection of the road of the Belleville & Eldorado Railroad Company, with the roads of appellee, appellee was to operate the three roads from East St. Louis to Eldorado as one road, and to "furnish all necessary rolling stock and equipment for the complete and perfect operation" of the road from Duquoin to Eldorado.

But independently of the provisions of the lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers, no less than as a carrier of freight. It cannot be said that the carriage of passengers in a car attached to a freight train is a suitable and proper operation of the railroad, so far as the carriage of passengers is concerned. The transportation of passengers on a freight train or on a mixed train is subordinate to the transportation of freight, a mere incident to the business of carrying freight. To furnish such cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This

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can be accomplished better by operating a separate passenger train than by operating a mixed train ; that is to say, the duty of furnishing all necessary rolling stock and equipment for the suitable and proper operation of a railroad carrying passengers involves and implies the duty of furnishing a train, which shall be run for the purpose of transporting passengers only, and not freight and passengers together. Railroad corporations, engaged in the transportation of passengers for hire or reward, are bound to the exercise of the highest degree of care and diligence in the conduct of their business. " Their duties and liabilities in this respect extend as well to the appliances used as to the manner of using them." 2 Ror. R. R. pp. 948, 949. But there are necessary differences between passenger and freight trains. 2 Wood, R. R. p. 1288. These differences need not be here noticed, but are well understood and easily recognized. Railroad companies are not required to adopt, on freight or mixed trains, all the appliances which they use on passenger trains, but they are merely required to use the highest degree of care consistent with the practical operation of such trains. Oviatt *v.* Railway Co., 43 Minn. 300 ; 44 Am. & Eng. R. Cas. 311 ; Missouri Pac. R. Co. *v.* Holcomb, 44 Kan, 332 ; 44 Am. & Eng. R. Cas. 311, note. When passengers are carried on freight or mixed trains, the care required by the company, so far as such appliances are concerned, is such as the nature of the train permits. 2 Wood, R. R. p. 1288. And, when a passenger rides on a freight or mixed train, he takes upon himself the increased risk and lessened comfort which is incident thereto ; nor has he the legal right to demand any other care in the management of such a train than is requisite for that kind of a train, or any other security than such a mode of conveyance affords. 2 Ror. R. R. p. 947 ; Railroad Co. *v.* Fay, 16 Ill. 568 ; Railroad Co. *v.* Hazard, 26 Ill. 373.

It follows that, when the only train operated by a railroad company is a mixed train, passengers, being

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unable to ride upon any other kind of train, are forced to incur risk and submit to inconvenience which do not exist on a separate passenger train. Hence the operation of a railroad with a mixed train only is inconsistent with the duty of furnishing such cars and locomotives as are necessary to the suitable and proper operation of the railroad when engaged in the passenger traffic. We are not unmindful of the fact that, within certain limits, a discretion may be exercised as to what rolling stock and equipment are necessary for the suitable and perfect operation of a railroad carrying passengers. Where the mode of carrying passengers is separate from the mode of carrying freight, the legitimate exercise of discretion may begin. What we hold is that there cannot be a suitable and proper operation of the railroad as a carrier of passengers where the car in which it carries its passengers is part of a freight train, because freight trains are inferior to passenger trains, and travel in them attended with less comfort, convenience, and safety than travel in passenger trains. The inferiority of a freight train to a passenger train, as a mode of carrying passengers, is so obvious that no man of ordinary understanding would regard the use of a freight train for the purpose of hauling a passenger car as a suitable and proper operation of a railroad in the matter of transporting passengers. We are, therefore, of the opinion that the act here sought to be enforced—the running of a passenger car or cars separately from freight cars—is sufficiently specific to be enforced by mandamus, and the right to compel its performance is clear and undoubted, unless such right is changed or modified by the decision of the question whether the expense of running such passenger car or train would be justified by the amount of business over the particular line of road running from Duquoin to Eldorado.

Counsel for appellee insist that a railroad company is not bound to provide a separate passenger train when its business is not sufficient to warrant it in doing so.

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In *Ohio & M. R. Co. v. People*, 120 Ill. 200, 30 Am. & Eng. R. Cas. 509, where the lower court awarded a mandamus upon a petition to compel a railroad company to repair and improve generally a certain portion of its road, and to increase the passenger trains thereon, we reversed the judgment, and held that the writ was improperly issued, upon the grounds that the business of the road did not pay the current expenses,—that the defendant was unable to perform the acts sought to be enforced,—and that the requirement made upon the defendant was too general, and involved too much discretion as to details: but it was there said that a railroad company could be compelled, by mandamus, to perform any specific duty which it owed to the public as owner or operator of its road, such as operating its road as a continuous line, and running daily trains; and the following language was used: "It is believed, however, no case can be found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled, by mandamus, to increase the number of trains on its road, or to run daily a particular number of trains over its road; and we are satisfied there is no common-law authority for making such an order. Of course, where the charter of the company expressly requires that not less than a given number of trains shall be run daily, the company may be compelled by mandamus to perform this, like any other specific duty enjoined by its charter, or by other statutory provision. * * * A company that runs a daily passenger train each way over a road which cannot, with proper management, be made to keep up repairs and pay running expenses, certainly does as much as the law requires of it, so far as passenger trains are concerned." There are several marked differences between the *Ohio & M. Ry. Co. Case* and the case at bar. Here the appellee does not run a daily passenger train each way over the road from Duquoin to Eldorado. Here the charter enjoins a duty which cannot be regarded as otherwise than spe-

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cific, in view of the considerations already presented. Here it cannot be said that the appellee is financially unable to discharge the duty imposed upon it by the law, and which it owes to the public. The learned circuit judge, before whom this case was tried below says, in his decision of it, that "the defendant railroad company is solvent, and in a prosperous condition, its net earnings last year being over \$600,000,—a net income of about \$3,000 per mile of road." After a careful examination, we are satisfied that the statement thus made is sustained by the evidence. When, however, it is said that "the defendant railroad company" has a net yearly income of some \$600,000, the reference is to the defendant railroad company, of its branches or leased roads, as well as the main stem. So far as appears from this record, the main road, owned by appellee, and operated under its own charter, is the short line running from St. Louis to Belleville, besides the leased roads running from Belleville to Duquoin, and Duquoin to Eldorado. Appellee also operates three other roads leased by it for long terms of years, to-wit: The Belleville & Carondelet Railroad, a short road about 17 miles long, running west from Belleville to East Carondelet, on the Mississippi river; the St. Louis Southern Railroad, about 46 miles long, which taps the said leased road that runs from Belleville to Duquoin, at Pinkneyville, about 10 miles east or northeast from Duquoin, and runs from Pinkneyville to Marion; and the Chicago, St. Louis & Paducah Railway, about 52 miles long, running from Marion to Brooklyn, on the Ohio river. The Belleville & Carondelet road was not leased by appellee until June 1, 1893, and, therefore, but little consideration can be given to it in making up the estimates of earnings and expenses, as found in the record. The large net income referred to is based mainly upon the earnings of the other five roads already mentioned. It is said that the earnings of the Belleville & Eldorado Railroad, running from Duquoin to Eldorado, when that road is taken by itself, and considered separately, are not sufficient to justify the ex-

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pense of running a separate passenger train from Duquoin to Eldorado. But why should this branch be considered separately and by itself? Appellee operates its main road and its leased branches as one system, and, as thus operated, the main road and its connections or branches yield the net yearly income of about \$600,000, already referred to. All the divisions, which are entirely within the boundaries of the state of Illinois, are mere feeders of the main road running from East St. Louis to Belleville, which is also in Illinois; and all the leased roads above mentioned, except that running from East Carondelet, are feeders of the road running from Belleville to Duquoin. The latter road and the Belleville & Eldorado Railroad are required, by the charter of the Belleville & Eldorado Railroad Company, and by the terms of its lease to or agreement with appellee, to be operated as one line; and such operation as one continuous line is merely the carrying out of the original intention of said charter, which provided for the operation of one continuous line from Belleville to Eldorado. It is no more proper to select the 50 miles from Duquoin to Eldorado of this compact network of roads, all operated under one system, and all contributing to the support of each other, as being deficient in the profits necessary to justify a reasonably safe and convenient operation of passenger traffic, than it would be to select any other portion of the line running from East St. Louis to Duquoin, and charge that portion with being deficient in such profits.

If it be admitted that a railroad company is not bound to run a separate passenger train when its business is not sufficient to warrant it in doing so, we are confronted at this point with the question whether this doctrine refers to the business done by the main road and other roads leased by it and connected with it, all of which are operated, or are required to be operated, as one line, or whether it can be made to refer to a small part of the continuous line or system which happens to run through a section of country, where the freight is not so much, and the passengers are not so many, as is

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the case on some other part of the line. We are of the opinion that the whole business of the various parts operated as one line should be taken into consideration where the circumstances are such as are revealed by this record. The duty required of a railroad company in the matter of transporting passengers is the duty to meet and supply the public wants. These wants are measured by the business actually done, or what it could be clearly shown would be done if increased facilities were granted. That there is here a public demand for passenger service is shown by the fact that a passenger car is attached to a freight train, and that passengers are invited to ride, and do ride, upon this mixed train. It is not contended that appellee is not abundantly able, out of the earnings realized by it from the system controlled by it, to pay the expense of running a passenger car separately from freight cars over the Belleville & Eldorado Railroad, and thereby save the traveling public from the increased danger and inconvenience of taking passage on a freight train. Nor does it appear that such expense could not be easily met by the earnings of the line running from East St. Louis to Eldorado, by way of Duquoin. The following language used by the supreme court of the United States in *St. John v. Erie R. Co.*, 22 Wall. U. S. 136, is applicable here: "The business of the road was a unit. If it had been disintegrated, as proposed by complainant, we apprehend it would have been found that the co-relations of the main stem and the branches were such, and that the expenses and charges incident to the entire business, and to those of the several parts, were so interwoven and blended, that an accurate ascertainment of the net profit of the main line, and any of the auxiliaries taken separately from the rest, would have been impracticable. An ancillary road may be short, and yield but little income; yet by reason of its reaching to coal fields, or from other local causes, its contributions to other roads of the series may be very large and profitable. Whether, in this case, the partial computation insisted upon could or could not have been.

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made, the process was one upon which the company was neither bound nor had the right to enter." The reports made by appellee to the railroad and warehouse commissioners for the years 1891, 1892, and 1893 show that it has never kept a separate account of the actual earnings or expenditures of the road from Duquoin to Eldorado, but has treated the line from East St. Louis to Eldorado as one continuous line, making no difference in its accounts between the division from Duquoin to Eldorado and any other portion of the road.

In estimating the liabilities of the Belleville & Eldorado Railroad Company, certain indebtedness, which is in the nature of preferred stock, is charged up as a liability, in the accounts produced, to show that the obligations of appellee are such as to relieve it from the duty of operating the passenger train asked for. This is manifestly improper, because guarantied or preferred stock is but a dividend, and not a debt, and the holder of a certificate for such stock can have no action against the company as for a debt, but his right is to a dividend. *Taft v. Railroad Co.*, 8 R. I. 310; *St. John v. Erie R. Co.*, *supra*; 1 Ror. R. R. p. 167. The object of incorporating railroad companies is to secure to the public increased facilities of transit from point to point, and an improved mode of carrying persons and property. Their public character is apparent from the fact that they are clothed with the power of taking private property, through the exercise of the right of eminent domain. Prior to the adoption of the present constitution, municipal corporations were authorized to aid in the construction of railroads by subscription for their stock. As a matter of fact, Franklin county, through which the Belleville & Eldorado Railroad passes, subscribed \$150,000 to its construction, of which indebtedness \$37,000 is still outstanding. Railroads are creatures of the law, and are intrusted with the exercise of these sovereign powers to promote the public interest, and are, therefore, bound to conduct their affairs in furtherance of the public objects of their creation. The

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interest of stockholders in their profits is secondary, and, in the main, subsidiary to the interest of the public. It is in view of their public character that the courts are authorized to determine and enforce the public duties enjoined upon them. The duties which they owe to the state and the general public cannot be shirked or evaded. 1 Wood R. R. p. 12; Railroad Com'rs v. Portland & O. C. R. Co., 63 Me. 269. We do not think that there is here such insufficiency of business or profits as to present valid defense to the application of the writ. The writ of mandamus should issue as prayed for. The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to enter a judgment awarding the writ in accordance with the prayer of the petition. Reversed and remanded, with directions.

NOTES.

Mandamus—Passenger Trains.—As to the duty to stop trains at stations, see 2 Rap. & Mack's Dig. 386. As to what duties a railroad company may be compelled to perform by *mandamus*, see note to 30 Am. & Eng. R. Cas. 515; 6 Rap. & Mack's Dig. 375.

Same—Railroad Compelled to Run Trains.—The Hartford and New Haven Railroad Company was chartered to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor. A steamboat company was afterwards chartered to run in connection with it to New York, and the railroad and line of steamboats constituted a route that was of great convenience to the public. After the construction of the road and the use of it in connection with steamboat for several years, the railroad company constructed a track diverging from the original track at a point a mile and a half from its terminus at tide water, and running to the station of the New York and New Haven Railroad Company, in the city of New Haven, and discontinued the running of passenger trains to the original terminus at tide water. This change incommoded travellers who wished to pass by the steamboat route, of whom there were many. *Held*, that a *mandamus* ought to be issued to compel the railroad company to run passenger trains to the original terminus. The railroad company had discontinued the running of passenger trains over that part of the road, under a contract with the New York and New Haven Railroad Company, by which the latter was to prevent the extension of a certain railroad chartered by the legislature which would interfere with the Hartford and New Haven road, and the New York and New Haven road was to secure an advantage over the line of steamboats in competing for public travel. *Held*, that this contract was void, as against

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public policy. *Held*, also, that the *mandamus* was properly applied for by the attorney for the state. *State v. Hartford, etc.*, 29 Conn. 538.

By the Act 36 Vic., c. 37 s. 13, the New Brunswick and Canada Ry. Co. is required "to provide and run all trains necessary for the carrying of passengers and freight," and to "run at least one daily train each way over the said main line and branches (Sundays excepted), unless prevented by weather, accident, or some other *unavoidable cause*, other than from want of railway stock, or from keeping the road and its appliances in good running order." *Held*, that the fact that there was no profit derived from running a daily train between St. Andrews and Watt Junction (one of the branches of the road) was not one of the "unavoidable causes" that would justify the company in not running a daily train. Railway acts, and those of that description, which are obtained on the application of their promoters, are treated as contracts between the incorporators and the public. The language of the acts is, therefore, considered as the language of the promoters, and where doubts arise as to the construction of that language, the benefit of the doubt is to be given to those who might be prejudiced by the exercise of the powers given by the act. Where the remedy by action is not so efficacious as that by *mandamus*, the right to the latter is not taken away. *Ex parte The Attorney General of New Brunswick*, 17 New Bruns. 667.

Same—Mixed Trains.—In *Arkansas Midland R. Co. v. Canman*, 62 Ark. 517, it was held that it is not the duty of a railway company to run separate passenger trains where its business is not sufficient to warrant it in so doing. But, if the business of the company is sufficiently large and profitable to warrant the running of separate passenger trains, and the safety of passengers is endangered by having the passenger coaches mixed up in the same train with freight cars, then it is the duty of the company to run separate trains. Where the business of the company is not such as to require it to run separate passenger trains, the Ark. Stat. (Mansf. Dig. § 5477), requires the company in forming mixed trains, to place baggage and freight cars in front of the passenger coaches; and if the use of bell pulls and air brakes on trains thus formed is impracticable, the law will not require it. But if the use of such appliances on mixed trains is practicable and necessary for the safety of passengers, then the law will demand it. The court said: "Was appellant required to run separate passenger trains on its road? All carriers are not required to adopt like expensive provisions for the safety of passengers. The business of a road might render it unsafe to use a single track and necessary to the safety of passengers to use a double one. It would, unquestionably, be safer for all railroads to have two tracks, and run all trains going in the same direction over the same track. But this does not make it the duty of all railroads to have double tracks. The provisions required to be adopted by passenger carriers for the safety of their passengers vary as the exigencies of the traffic and its remunerative character demand and justify. A railway constructed through a thinly settled country, moving but little freight and few passengers, and running its trains at a slow rate of speed, cannot be expected to be equipped and operated in the same manner as is necessary in the case of a railway running through a densely populated territory, and moving a large volume of traffic. So the line of a railroad may

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be so short, and the business done by it so small as to make it unreasonable to require it to run separate trains for freight and passengers. If the business done does not warrant it, it would be unreasonable and oppressive to demand it, and it would not be required. But, on the other hand, if the business was sufficiently large and profitable to warrant it, and the safety of the passengers was endangered or diminished by having the passenger coaches mixed in the same train with freight cars, it would clearly be the duty of the railway company to run separate trains. If it was not the duty of appellant to run separate passenger trains, then, under the statutes of this state, it was its duty, in forming its trains, to place the baggage and freight cars in front of the passenger coaches. Mansf. Dig. § 5477. Under such circumstances, the law would not require bell pulls and air brakes to be used on such trains, if it was impracticable to do so. But, on the other hand, if the rule as to care and diligence already laid down required them to be used, it was the duty of appellant to have done so." Missouri Pac. R. Co. v. Holcomb, 44 Kan. 332; 44 Am. & Eng. R. Cas. 311, 312.

Same—Railroad not Compelled.—In Ohio, etc., R. Co. v. People, 120 Ill. 200, 30 Am. & Eng. R. Cas. 509, it was *held* that there was no authority at common law for granting a writ of *mandamus* to compel a railroad company to increase the number of trains or to run a particular number of trains over its road daily. This case was commented upon and distinguished in the principal case.

Company becoming owner of two lines of road between two *termini* abandoned one line, but accommodated people by operating other. *Held*, that it could not be compelled by *mandamus* to operate both lines. People v. Rome, etc., R. Co., 103 N. Y. 95; 28 Am. & Eng. R. Cas. 35.

A peremptory *mandamus* was awarded in this case commanding the defendant, a railroad company, to run upon its road from its station in Locust avenue, Queens county, and its station at Long Island city, in the morning and evening, such passenger trains as would, taking into consideration the usual business hours of the day in New York, afford reasonable and necessary railroad facilities to the residents and travelers at Locust station. The company ran one freight train, with a passenger car attached, from Long Island city, stopping at Locust station, in the morning, and ran it back to the city in the evening. There were but nine houses at Locust station, and but five persons holding commutation tickets. The receipts at that station fell from \$274.69, in 1877, to \$198.23, in 1881. The extra expense of maintaining the road-bed for full passenger travel would be about \$1,500 a year. Prior to the present arrangement the company ran six or seven trains each way daily, and the average number of passengers from this station each way was less than one a day. Jamaica station, at which all trains stopped, was less than two miles from Locust station. *Held*, that the court erred in awarding the *mandamus*. *Quære*, as to the power of the court to control a railroad company in exercising the power of regulating the time and manner in which passengers and property shall be transferred, conferred upon it by section 9 of subdivision 2 of chapter 133 of 1880, so long as it does not suspend or cease to perform its duties as a common carrier. People v. Long Island R. Co., 31 Hun (N. Y.) 125.

Same—Illinois, Arkansas, and Minnesota Acts.—An Illinois stat-

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ute required all trains to stop at county seats. Upon the construction of this statute see Illinois Cent. R. Co. v. People, 143 Ill. 434, 61 Am. & Eng. R. Cas. 539, in which case the Illinois decisions are considered. Similar statutes have been held valid in Arkansas and Minnesota, and *mandamuses* held to lie to enforce them. State v. Gladson, 57 Minn. 385, 61 Am. & Eng. R. Cas. 556; St. Louis, etc., R. Co. v. B'Shears, 59 Ark. 237, 61 Am. & Eng. R. Cas. 556. The Arkansas statute required trains to stop within the corporate limits, upon the application of not less than fifty citizens.

ST. LOUIS, I. M. & S. R. Co.

v.

GREENTHAL.*

(Circuit Court of Appeals, Eighth Circuit, Nov. 2, 1896.)

Injury to Passenger by Insane Person—Evidence.—Evidence relative to the previous insanity of an insane person who killed a passenger on a train was relative and competent to show his mental condition at the time of the killing, in an action against the railway for damages for such killing, and the fact that such evidence did not show that the defendant railway company had knowledge of such previous insanity was not ground for the exclusion of the evidence, as the plaintiff, while required to prove the insanity and the defendant's knowledge thereof, was not required to prove both of these facts at the same instant, nor by the same witnesses.

Same—Conversation—Res Gestae.—In such an action, a conversation relative to the sanity of such person, had by the conductor of the train while at his post, just prior to the killing, with a passenger in his charge who had become alarmed for her personal safety, was a part of the *res gestae*, such conversation being in the line of the conductor's duty.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action brought by Sallie Meyer (now Sallie Greenthal), administratrix of the estate of Isadore Meyer, deceased, against the St. Louis, Iron Mountain & Southern Railway Company and Pullman's Palace-Car Company, for damages for the killing of intestate by an insane fellow passenger on defendant's train and car. The verdict and judg-

Case Stated.

*See notes at end of case.

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ment below were for plaintiff, and the defendants have brought error.

For a full statement of this cause and the legal principles involved therein, reference is made to the opinion of this court delivered when the case was first here. *Meyer's Adm'x v. Railway Co.*, 10 U. S. App. 677. The change in the name of the plaintiff is accounted for by her marriage.

The complaint alleges, in substance, that on the 17th of February, 1891, Isadore Meyer, of Bald Knob, in the state of Arkansas, boarded defendant's train, and took his seat in the Pullman Palace-Car Company's car as a passenger, going south; that a few minutes thereafter, and after the train had started south, suddenly, and without warning, Meyer was shot and instantly killed by J. W. Graeter, a passenger on the train and in the Pullman car; that Graeter was a dangerous lunatic, and an utter stranger to Meyer, but that both defendant companies knew the dangerous condition, character, and disposition of Graeter when they received him as a passenger, and negligently allowed him to continue as a passenger on the train in the sleeping car, without guard or protection against violence towards the passengers on the train on the part of the maniac Graeter. The defendants' answer denied the allegations of the complaint. Upon the second trial the plaintiff recovered judgment, and the defendants sued out this writ of error.

Percy Roberts and *George E. Dodge* (*B. S. Johnson* was with them on the brief), for plaintiffs in error.

G. B. Rose (*W. M. Beckner*, *U. M. Rose*, and *W. E. Hemingway* were with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The assignments of error relate exclusively to al-

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leged errors growing out of the admission of testimony, and are all of the same general character. The defendants denied that Graeter was insane, or that they knew or had any reason to believe that he was insane. To prove Graeter's insanity, the plaintiff introduced a number of witnesses, who testified, in substance, that Graeter was violently insane in Ft. Worth, Tex., about two or three weeks before he killed Meyer; that, by direction of his brother, he was taken in charge and sent to his home in Vincennes, Ind., in the care of two keepers; that he was taken north over the road of the defendant railway company in a sleeping car of the defendant the Pullman's Palace-Car Company, manacled; that he was very violent when first put on the train, and at intervals afterwards, and at times exhibited a homicidal tendency. The assignments of error relate chiefly to the admission of this testimony. The first ground of objection to its admission is that it was irrelevant and immaterial, for the reason that the question was whether Graeter was insane at the time of the killing, and that proving that he was insane three weeks before did not tend to prove him insane at that time. It is true that one of the issues to be tried was whether Graeter was insane at the time he killed Meyer, but the evidence on this issue cannot be restricted to the very hour or day of the occurrence. Such evidence may relate to his mental condition within any reasonable limit of time, either before or after the killing. On such an issue a wide latitude is allowed, and the words, appearance, conduct, and personal history of the alleged lunatic, extending over a period of many years, may be shown, and even the mental condition of his ancestors may be inquired into. The rule on this subject is stated by JUDGE CLIFFORD in *U. S. v. Holmes*, 1 Cliff. (U. S.) 98, Fed. Cas. No. 15,382, as follows:

Injury to Passenger—Evidence.

"The precise question to be tried in all such cases is whether the accused was insane at the very time he committed the act, and to that point all the evidence must tend. Great difficulties surround the inquiry, and

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it is for that reason that the rules of law allow a wide range of testimony in the investigation. Proof of hereditary insanity is, therefore, admissible as affording some ground of presumption that the alleged diseased state of mind may have descended through those from whom the accused derived his existence. Evidence of acts, conduct, and declarations, both before and after the time of the committing of the act, tending to show an insane state of mind are also admissible as having some bearing on the point in controversy."

All the authorities are to the same effect. *Green v. State*, 59 Ark. 249; *Busw. Insan.* p. 249; *People v. Garbutt*, 17 Mich. 10.

Another objection to the introduction of this evidence was that it did not show that the defendants had any knowledge that Graeter was insane at Ft. Worth. Under the state of the pleadings, the burden was on the plaintiff to prove Graeter's insanity, and that the defendants knew that he was insane or had good grounds to believe it. The plaintiff, however, was not required to prove both these facts at the same instant or by the same witnesses. Upon the issue as to Graeter's insanity, the evidence was relative and competent.

It is insisted in the brief of counsel for the plaintiffs in error that the defendants had no knowledge that Graeter was insane or dangerous when he was received as a passenger, or afterwards, until the tragedy occurred. But this is a question of fact which was conclusively settled by the verdict of the jury. The sufficiency of the evidence to warrant the verdict of the jury was not challenged in the court below by a request for a peremptory instruction, and cannot, therefore, be challenged in this court.

Miss Mary Wallrath was a passenger on the train, and riding in the same sleeper with Graeter. Graeter's appearance, conduct, and conversation were such as to alarm her, and she called the attention of the conductor to him, and said to the conductor: "I am afraid of that man," and thereupon a conversation ensued between the witness and

Same - Conversation - Res Gestae.

the conductor in relation to Graeter's condition, in the course of which the conductor said to the witness that, about two or three weeks before, he had brought Graeter down in the car from Ft. Worth handcuffed, and that he was violently insane. This conversation occurred only a short time before Meyer was killed. The passengers in the car were under the care and protection of the conductor. If he knew or had reason to believe that Graeter was a dangerous lunatic, it was his first and highest duty to take proper action at once for the security and protection of his passengers against the violence of the insane man. Failing to discharge this first and highest duty, it was clearly his duty to communicate to the passengers the facts within his knowledge which showed or tended to show that they were riding in the car with a violently insane man, who was under no guard or restraint, to the end that they might themselves take suitable precautions for their safety. Having omitted to discharge his highest duty for the safety of his passengers, he should, at the very least, have advised them of their danger. It will be observed that the conversation was not had with one having no interest in its subject-matter. It was had while the conductor was at his post of duty, with a passenger in his charge, and entitled to his protection, who had become alarmed for her personal safety, and who was rightfully seeking information from the conductor as to what he knew about Graeter, whose appearance and conduct had put her in fear. Under these circumstances, it would have been a gross violation of his duty if the conductor had not imparted to the passenger the information he possessed concerning Graeter. If he was not going to take action himself for her protection, and he did not, it was his duty to disclose to the passenger, in answer to her appeal, all the facts within his knowledge tending to show that Graeter was a madman, and dangerous to her safety. What he then said on that subject was said in the discharge of a duty imposed upon him by his office, and is clearly a part of the *res gestæ*. He was acting strictly in the

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line of his duty, though not up to the full measure of his duty, for which he paid the penalty of his life, for he, too, was killed by Graeter.

The judgment of the circuit court is affirmed.

NOTE.

Insane Persons.—The degree of care imposed upon a company which has accepted an insane person as a passenger is of the highest character; if the safety and comfort of the other passengers will not be imperilled, the insane person may be taken to the end of his journey, or he may be removed from the train at the first station where he may be properly cared for; but so long as he is on the train the company is bound to do whatever in the way of restraint, or isolation is reasonably demanded for the safety and comfort of the other passengers. *Meyer v. St. Louis, etc., R. Co.*, 10 U. S. App. 677; 58 Am. & Eng. R. Cas. 111.

So soon as a company acquires knowledge of the insane condition of a passenger, whether such knowledge is acquired before or at the time he becomes a passenger or from his acts subsequent to the beginning of the journey, it is charged with the duty of exercising proper care for the protection of the other passengers upon the train. *Meyer v. St. Louis, etc., R. Co.*, 10 U. S. App. 677; 58 Am. & Eng. R. Cas. 111.

If the employees of the company in the exercise of the high degree of care demanded of them could not have reasonably anticipated that a failure to eject or restrain the insane passenger might result in doing injury to his fellow-passengers, their non-action would not constitute negligence. *Meyer v. St. Louis, etc., R. Co.*, 10 U. S. App. 677; 58 Am. & Eng. R. Cas. 111.

If there is reasonable ground to believe that an insane passenger is dangerous, it is the duty of the conductor to restrain him, even though he may be quiet at the time; and it is error to instruct the jury that the law does not justify restraint if the insane person is violent in neither word nor act and gives no indication of insanity except by expressing fear of violence from others. *Meyer v. St. Louis, etc., R. Co.*, 10 U. S. App. 677; 58 Am. & Eng. R. Cas. 111.

A carrier is not obliged, as a matter of law, to receive as a passenger an insane person, or one whose physical or mental condition is such that his presence upon the vehicle may cause injury or substantial discomfort to the other passengers; and such insane person may be refused, where he is known to be insane, though at the time of offering to become a passenger he is apparently harmless and conducts himself in no way differently from other persons. *Meyer v. St. Louis, etc., R. Co.*, 10 U. S. App. 677. 58 Am. & Eng. R. Cas. 111. *Following Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108; *Pearson v. Duane*, 4 Wall. (U. S.) 605.

Zackery v. Mobile & O. R. Co.

ZACKERY

v.

MOBILE & O. R. Co.*

(Supreme Court of Mississippi, Feb. 1, 1897.)

Rejection of Passenger by Railway Company.—A carrier cannot refuse to carry a blind person for no other reason than his blindness.

APPEAL from Clarke county circuit court. *Reversed.*

J. L. Buckley and D. W. Heidelberg, for appellant.
A. J. Russell and Chas. M. Wright, for appellee.

STOCKDALE, J. On the 13th of March, 1896, appellant exhibited his complaint in the circuit court of Clarke county, alleging that for several years he had been travelling on appellee's road, and had business at various stations, and had never given cause of complaint to appellee's servants, and no objection had been made to his riding on appellee's train until January 25, 1896, and February 23, 1896, at which times appellee refused to sell him tickets from Chickora and Vinegar Bend, and from Vinegar Bend to Buckatunna, which was humiliating and annoying, he being away from home; that on 13th of March, 1896, he was again denied tickets to ride on defendant's road, at Stonewall Station, and that on all these occasions he offered the agents of said road the price of the fare, and had engagements that he was deprived of filling on account of the willful refusal of appellee's agents to sell him tickets; that appellee had no other reason for refusing him passage than that appellant was blind, which is true. To this declaration appellee (defendant below) interposed a demurrer, upon the ground that the declaration shows that the plaintiff was blind, and was not a

*See notes at end of case.

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fit person to travel by himself, and that, as a matter of law, defendant had a right to decline to sell plaintiff a ticket, unless accompanied by an attendant. The court below sustained the demurrer, and the plaintiff appealed.

The demurrer admitting the truth of the allegations of the complaint, one of which is to the effect that the appellant had been riding on appellee's road for several years, pursuing his occupation, and had given no cause of complaint, and none had ever been made until January 25, 1896, and that the sole reason for rejecting him as a passenger was his blindness, it follows that the naked question, detached from any attending circumstances, was whether a person otherwise qualified may be rejected as a passenger for the sole reason that he is blind, and this court is asked to announce that to be the law. There seems to be a scarcity of decisions on the precise point. In 2 Ror. R. R. p. 957, it is laid down as the law that, "as common carriers of persons, railroad companies are ordinarily bound to carry, according to their reasonable rules and regulations, and in accordance with their regular time-cards, all persons who apply to be carried, and are ready to pay, and do pay, the usual fare when required, * * * except unsuitable persons hereinafter mentioned." These exceptions are those who desire to injure the company, notoriously bad or justly suspicious persons, gross or immoral persons, drunken persons, and those who refuse to obey the rules. It is laid down in Ang. Carr. § 524, to be the common law that it is "the duty of public or common carriers of persons *to receive all persons who apply for a passage.*" (These words italicised.) In section 525 it is said: "It is in fact beyond all doubt that the first and most general obligations on the part of public carriers of passengers, whether by land or water, is to carry persons who apply for a passage." These are the general rules, subject always to the exceptions enumerated; but we have not found any decision holding that, as a matter of law, a person can be rejected because he is blind.

Notes.

It is urged by counsel for appellee that a rule of a railroad company authorizing the refusal by its agents of an infirm passenger unless provided with an assistant is reasonable, and demanded by the convenience of the traveling public—a proposition we do not controvert; but in this case there is nothing in the record to show that appellee had made or promulgated such a rule. On the contrary, it is alleged in the complaint (admitted by the demurrer) that appellant was not infirm, but robust, able to take care of himself, and to comply with the rules applying to passengers generally; that he had been traveling on appellee's road for several years, and given no cause of complaint to appellee's servants, and none was ever made. All this being admitted by the demurrer, the doctrine laid down in *Sevier v. Railroad Co.*, 61 Miss. 10, relied on by appellee, does not apply to this case. There is nothing to show that appellant was informed that the absence of an attendant was the cause of his rejection, and nothing to show that he needed one. Appellee's counsel contends that infirm passengers require more and extra care, and for that reason railroad companies have the right to reject them. But appellee admits by its demurrer that appellant was not such a passenger, and had never required extra care. We do not desire to intimate any opinion as to what regulations and rules railroad companies may make as to passengers; but we decline to hold that as a proposition of law, stripped of all attending circumstances, public carriers of passengers can reject a person otherwise qualified upon the sole ground that he is blind. The judgment of the court below is, therefore, reversed, the demurrer overruled, and the cause remanded.

NOTES.

Duty of a Carrier to Receive Passengers—Disabilities.—Every citizen is *prima facie* entitled to become a passenger on a railway train, and the law requires the carrier to transport with impartiality and safety all those who offer. *Norfolk, etc., R. Co. v. Gallisher*, 89 Va. 639; *Winnegar v. Central Pass. R. Co.*, 85 Ky. 547, 34

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Am. & Eng. R. Cas. 462; *Chicago, etc., R. Co. v. Pillsbury*, (Ill.), 26 Am. & Eng. R. Cas. 241; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 51 Am. & Eng. R. Cas. 222; *Thurston v. Union Pac. R. Co.*, 4 Dill. (U. S.) 321; *Waldron v. Chicago, etc., R. Co.*, 1 Dakota 336; *State v. Chovin*, 7 Iowa 204; *Saltonstall v. Stockton*, 1 Taney (U. S.) 11; *Beekman v. Saratoga, etc., R. Co.*, 3 Paige (N. Y.) 45.

Thus persons who are ill must be carried. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344. So a railroad cannot refuse to receive a non-union laborer because he is objectionable to his neighbors. *Chicago, etc., R. Co. v. Pillsbury* (Ill.), 26 Am. & Eng. R. Cas. 241. This was a dictum of the court, which is not affected by the fact that the opinion in this case seems to be rejected on rehearing, 31 Am. & Eng. R. Cas. 24, 123 Ill. 9.

Persons Who May Be Excluded.—(See notes to 13 Am. & Eng. R. Cas. 48, 26 Id 248.) A company as a common carrier is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form or committing any crime; nor is it bound to carry persons infected with contagious diseases, to the danger of other passengers. But if such objectionable character has bought a ticket the amount paid should be paid back or tendered before he is expelled. *Thurston v. Union Pac. R. Co.*, 4 Dill. (U. S.) 321.

A carrier may exclude a person who wishes to travel for the purpose of soliciting business in conflict or competition with that in which the carrier is engaged, and may refuse transportation to such person, though he is willing to pay the regular fare. *Barney v. Oyster Bay, etc., Steamboat Co.*, 67 N. Y. 301; *affirming 2 Thomp & C. (N. Y.) 598*.

Disabled Persons without Attendants.—A company is not bound to accept as a passenger on its cars, without an assistant, one who, because of physical and mental disability, is unable to take care of himself; but if it voluntarily accepts such a person as a passenger, without an assistant, rendering it necessary that special care be taken, the company is negligent if such care and assistance are not given. *Croom v. Chicago, etc., R. Co.*, 52 Minn. 296, 58 Am. & Eng. R. Cas. 74.

Persons laboring under physical infirmities or otherwise unable to take care of themselves, who travel on railroad trains, must provide proper assistance for themselves, and it is not the duty of the conductor in the absence of instructions from the company, to render such assistance. *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas., 347. *Approving New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607; *Willets v. Buffalo & R. R. Co.*, 14 Barb. (N. Y.) 585; *Quoting Sheridan v. Brooklyn, etc., R. Co.*, 36 N. Y. 39.

Knowledge communicated to the conductor of a train that a passenger is feeble and will need assistance in getting off is notice to the carrier, and it is not necessary to notify every other conductor and train hand that may be in charge of the train. *Foss v. Boston, etc., R. Co.*, 66 N. H. 256, 47 Am. & Eng. R. Cas. 566.

In putting off a passenger who has gotten upon the wrong train by mistake, when informed of his dimness of vision or feeble condi-

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tion, the carrier must use such care as his condition requires to prevent injury. *Columbus, etc., R. Co. v. Powell*, 40 Ind. 37.

Insane Persons.—A carrier is not obliged, as a matter of law, to receive as a passenger an insane person, or one whose physical or mental condition is such that his presence upon the vehicle may cause injury or substantial discomfort to the other passengers; and such insane person may be refused where he is known to be insane, though at the time of offering to become a passenger he is apparently harmless and conducts himself in no way differently from other persons. *Meyer v. St. Louis, etc., R. Co.*, 10 U. S. App. 677, 58 Am. & Eng. R. Cas. 111. *Following Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108; *Pearson v. Duane*, 4 Wall. (U. S.) 605.

Intoxicated Persons.—The fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car; nor does it free the company from its duty to render to him, as a passenger, due care. *Milliman v. New York, etc., R. Co.*, 66 N. Y. 642; *affirming 4 Hun* (N. Y.) 409; 6 *Thomp. & C.* (N. Y.) 585. *Explaining Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108.

A common carrier is not obliged as a matter of law to receive as a passenger an insane or drunken person, or one whose physical or mental condition is such that his presence may cause injury or subsequent discomfort to the other passengers; and the carrier may exclude any one whose condition is such that a possibility of danger may be thrown upon the other passengers if he is admitted as a passenger. *Meyer v. St. Louis, etc., R. Co.*, 10 U. S. App. 677, 58 Am. & Eng. R. Cas. 111. See also *Pearson v. Duane*, 4 Wall. (U. S.) 605.

A company may refuse to receive and carry as a passenger any person who is so intoxicated as to be disgusting, offensive, disagreeable, or annoying, as long as he continues in that condition, though he may have purchased a ticket entitling him to passage. *Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576, 18 Am. Ry. Rep. 454.

Slight intoxication, such as would not seriously affect the conduct of the passenger, will not justify a company in refusing to receive and carry him. *Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576, 18 Am. Ry. Rep. 454.

Towards Persons Mentally Incapacitated.—Where an unattended passenger, after entering upon a journey, becomes sick and unconscious, or insane, it is the duty of the company to remove him from the train and leave him until he is in a fit condition to resume his journey, or until he has obtained the necessary assistance to take care of him to the end of the journey. *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543, 21 Am. & Eng. R. Cas. 418.

The duty of the company to such a passenger does not end with his removal from the train, but it is bound to the exercise of reasonable and ordinary care in temporarily providing for his protection and comfort; and—*held*, that the company may have exercised due care towards such a passenger, who is without friends or money, when it carefully and prudently removes him from its train and promptly places him in charge of the overseer of the poor. The statute makes it the duty of an overseer of the poor in any township or city to grant temporary relief to any non-resident who may be found lying sick therein, or in distress, and without friends or money, and the expense of providing such relief is to be paid out of the county treasury. *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543, 21 Am. & Eng. R. Cas. 418. *Quoted in Indianapolis, etc., R. Co. v. Pitzer*, 109 Ind. 179, 25 Am. & Eng. R. Cas. 313.

Blondel v. St. Paul City R. Co.

BLONDEL

v.

ST. PAUL CITY R. CO.

(Supreme Court of Minnesota, Nov. 20, 1896.)

Street Railways—Injuries to Passenger—Contributory Negligence—Question for Jury.—The plaintiff was riding in the vestibule of an electric street car, going at a fast rate, when it came to a sharp curve, of which the plaintiff knew, and he was thrown against the side of the vestibule by reason of the rapid rate at which the car rounded the curve. *Held*, that the question of the plaintiff's contributory negligence in riding in the vestibule was one of fact for the jury.

Expert Testimony—Question for Trial Court.—The qualification of a witness to testify as an expert is a question for the trial court, whose decision will not be reversed on appeal unless it is manifestly against the weight of the evidence.

APPEAL from Ramsey county district court. *Affirmed.*

Munn, Boyesen & Thygeson, for appellant.

McCafferty & Noyes, for respondent.

START, C. J. This is a personal injury case, in which the plaintiff had a verdict for \$200, and the defendant appealed from an order denying its motion for a new trial. Two reasons are urged by the defendant why the order should be reversed:

1. That the verdict is not sustained by the evidence, because it shows that the plaintiff was guilty of contributory negligence. The plaintiff's evidence tended to show that he was a passenger on an electric car on the defendant's street-railway line; that there was a sharp curve in the track at Marshall and Prior avenues, in the city of St. Paul, and that, when the car was some three or four blocks from this curve, he left his seat and went to the rear vestibule where the conductor was

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standing, and asked him as to the point it would be necessary for him to leave the car to go to the Town and Country Club; that while thus engaged, and standing by the conductor, the car passed the curve without slacking its speed, and at a dangerous rate,—some 14 or 15 miles an hour,—as plaintiff claims, whereby he was thrown against the wall of the vestibule, and his hand and arm injured. He admitted that he knew of the curve, and that the car was approaching it at a fast rate of speed. The evidence on the part of the defendant tended to show that the car was not driven at an unsafe rate of speed around the curve, and it also contradicted the evidence of the plaintiff in other important particulars. The defendant claims that, as a matter of law, the plaintiff was guilty of contributory negligence in remaining on the platform by the conductor, instead of going inside of the car, as it approached the curve. But he had a right to assume that the persons in charge of the car would slacken the speed of the car, and not pass the curve at an unsafe rate of speed; and whether, under all the circumstances of the case as disclosed by the evidence, he was guilty of contributory negligence in the premises, was a question of fact for the jury. The verdict is sustained by the evidence.

2. That the trial court erred in sustaining the plaintiff's objection to a question asked of the conductor of the car. The question and its connection were as follows: "Q. How long have you been running on that line, Mr. Devereaux? A. Nineteen months. Q. Do you know what would happen in case a car would approach that curve, in coming west, at the rate of ten or fifteen miles an hour? A. Yes, sir. Q. You may state to the jury what, in your judgment, would happen? (Objected to for the same reason,—no proper foundation laid.)" The objection is somewhat obscure, but it was evidently intended, and so understood by the parties and the court, as an objection to the competency of the witness; that is, no foundation for the question had been laid by showing that the witness was compe-

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tent. If the effect of running a street car around a sharp curve at the rate of speed stated in the question be not a matter of such common knowledge as to exclude expert evidence on the question, then the person called to give such evidence must be shown to be competent. The only fact testified to by the witness as to his competency was that he had been running on the line, at the time of the trial, 19 months, and knew what would happen if the car ran the curve at the speed stated. The question of the competency of a witness to give expert evidence is largely in the sound discretion of the trial court, and its decision of the question will not be reversed by this court unless it is manifestly against the weight of the evidence. *Papoosheck v. Railway Co.*, 44 Minn. 195; *Crich v. Insurance Co.*, 45 Minn. 443; *Lawson, Exp. Ev.* 236. The evidence in this case falls far short of conclusively showing the competency of the witness. It is to be observed that the conductor was not asked for the result of his experience and observation in the matter of running a car at a high rate of speed around a sharp curve, but the question simply called for his judgment (opinion) as to what would happen in such a case. The simple fact that he had been a conductor on the line for 19 months, or that he said he knew what would happen in the supposed case, did not necessarily qualify him as an expert. It did not appear that he had ever witnessed any facts or experiments which would qualify him to give an opinion, or that he had any special or greater knowledge of the laws of mechanics than the jury or men in general possessed. It was not reversible error for the court to sustain the objection. Order affirmed.

GUNN

v.

OHIO RIVER R. CO.*

(*Supreme Court of Appeals of West Virginia, Dec. 9, 1896.*)

Demurrers to Evidence.—The syllabus in *Garrett v. Ramsey*, 26 W. Va. 345, upon demurrers to evidence, approved.

Infants—Contributory Negligence.—A child of very tender years is not chargeable with contributory negligence.

Duty of Engineer to Keep Lookout.—The engineer and fireman of a railroad train must keep a careful lookout on the track ahead to discover persons and animals upon it, and use ordinary care to avoid injury to them.

Infants on Tracks—Duty of Engineer.—While it may be assumed by the engineer that a person walking upon a railroad track will get off it in time to save himself from injury from a train, yet that is not the rule as to children of very tender years, or persons plainly and obviously disabled by deafness, intoxication, sleep, or other cause from taking care of themselves.

Parents' Negligence.—Parents' negligence. When it prevents recovery for injury to children.

Demurrer to Evidence.—Demurrer to evidence, principles of.

(Syllabus by the Court.)

ERROR to Mason county circuit court. *Reversed.*

W. R. Gunn, C. E. Hogg, and J. E. Beller, for plaintiff in error.

V. B. Archer, H. P. Camden, and Jas. B. Menager, for defendant in error.

BRANNON, J. Two little boys, Henry C. Mayes, not quite five years old, and Luelza Mayes, about six years old, were killed by a train on the Ohio River Railroad, and this is a suit by the administrator of Henry C. Mayes against the Ohio River Railroad Company to recover damages for his death. The briefs of counsel are elaborate and able, laying down all the propositions arising, and citing all the

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*Note.—See 2 Rap. & Mack's Digest, 731.

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law necessary for decision; and have been very helpful in the decision of the case.

If Henry C. Mayes had been an adult, no recovery could be had for his death, as he met his sad and early death on the railroad track, and the defense of contributory negligence would defeat recovery; but a child of

Infants—Contributory Negligence.

the tender years of this child is not chargeable with contributory negligence, for want of judgment, discretion, and presence of mind to know and avoid danger. *Dicken v. Coal Co.* (W. Va.) 23 S. E. Rep. 582; *Westbrook v. Railroad Co.* 66 Miss. 560; 39 Am. & Eng. R. Cas. 374; *Bottoms v. Railroad Co.*, 114 N. Car. 699, 60 Am. & Eng. R. Cas. 141; *Summers v. Brewing Co.*, 143 Pa. St. 114. The law is clear that those in charge of a

Duty of Engineer to Keep Lookout.

train must, by keeping up a reasonable lookout, use fairly ordinary care to discover animals and persons on the track, both to save them and passengers from injury. The public interest and necessity, not merely the company's, demand that the company have sole possession of its track; but, as people live and move along the route, they do go upon the track; children, in their thoughtlessness and indiscretion, will go upon it; stock will wander upon it; and sheer necessity calls for such care as is exacted by this rule. *Gunn v. Railroad Co.*, 36 W. Va. 165, 54 Am. & Eng. R. Cas. 167; 2 Wood, Ry. Law, § 320; opinions in *Raines v. Railroad Co.*, 39 W. Va. 50, 60 Am. & Eng. R. Cas. 75. Some courts hold that no duty lies on the company to look ahead for persons on the track, as it has exclusive right to its track except at crossings, and they are trespassers; but we have held that there must be a lookout even for live stock and ordinary care to prevent injury to it. *Layne v. Railroad Co.*, 35 W. Va. 438, and cases. And, certainly, the same care would be required so

Infants on Track—Duty of Engineer.

far as infants, deaf, and other disabled persons are concerned, if not as to others. But our court has settled this in cases above cited. If a child trespassing on a railroad track is struck by an

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engine, the company is liable if the engineer, by such careful and vigilant lookout as is consistent with other duties, could have seen the child in time to prevent the accident. *Railroad Co. v. Grablin*, 38 Neb. 90; *Bottoms v. Railroad Co.*, 114 N. Car. 699, 60 Am. & Eng. R. Cas. 141; 2 Wood, Ry. Law, § 320. So if the child is going towards the track, or running near it, evidently going on it. An adult seen upon the track, the presumption is that he will get off, but not so with little children. When they are seen on the track, the duty is to stop and save them. *Raines v. Railroad Co.*, 39 W. Va. 50, 60 Am. & Eng. R. Cas. 75; Wood, Ry. Law, § 320; *Bottoms v. Railroad Co.*, 114 N. Car. 699, 60 Am. & Eng. R. Cas. 141. Such is the law of the subject. What are the rights of the parties under it upon the facts? The defendant withdrew the case from the jury by a demurrer to the evidence. This has an important bearing, as certain principles apply in deciding a case on such demurrer.

A demurrer to evidence by the defendant admits all that can reasonably be inferred by a jury from the plaintiff's evidence, and waives all the defendant's contradictory evidence, or evidence the credit of which is impeached, and all inferences from the defendants' evidence that do not necessarily flow from it. The evidence must be interpreted most favorably to the demurree, so that he may have all the benefit which a verdict in his favor by the jury would give him. In determining the facts inferable from the evidence, where there is grave doubt, those inferences or conclusions most favorable to the demurree will be adopted; and, unless there is a decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made in his favor. If the evidence is such that, if there were a verdict in favor of the demurree, the court ought not to set it aside, then, on the demurrer to the evidence, the court ought to give judgment against the demurrant. *Stolle v. Insurance Co.*, 10 W. Va. 546; *Garrett v. Ramsey*, 26 W. Va. 345;

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Evidence.

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Franklin v. Geho, 30 W. Va. 27; *Fowler v. Railroad Co.*, 18 W. Va. 579. Keeping in mind these principles, let us look at the evidence to see what inferences ought to be made from it. The children were killed on a little trestle over a small stream, while sitting on the guard rail. The turning question is: Had they been there long enough before the train struck them to have enabled the trainmen to see them in time to save them, as the plaintiff claims they had been, or did they go upon the trestle when the engine was within 50 feet or a very short distance of them, too short to save them, as the defendant claims? The engineer says he could see the track for half a mile or more, as it was straight, and he was looking out, and could see over the trestle, and could see nothing on it; that there were some willows near the trestle, which cast a shade over part of it. He says he saw nothing till within 40 or 50 feet of the trestle, when he caught a glimpse of something between the willows or on the trestle (he could not say which) when he sounded the whistle, and it moved, and he saw it was children. He said they were not before on the track to be seen. They were there when killed. We know this. When did they go there? They were sitting astraddle the guard rail when the engine struck them, indisputably. This leaves the inference that they had been there some time. If interest in the train called them from the willows, would they likely have sat down or stood up, alive with interest? If they had so recently gone upon the trestle, is it not reasonable to say that the engineer, on the lookout, as he says, would have seen them,—two children walking? The train was dashing on at 30 miles an hour, and as it would take some time for them to go upon the trestle, and sit down, they must have been on it some time before the engine was within 50 feet; that is, they must have been there when the engine was further distant than that distance. The engineer does not say he saw them going on the trestle, though we would infer from his evidence that they suddenly went upon it. Would he not have seen them that bright June morning at 8

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o'clock, with a straight track and unimpeded view for half a mile? If, as he says, the willows shaded one corner of the trestle, tending to prevent his seeing them sitting still, would he not have seen two children moving, in the act of going upon the trestle? The fireman had been engaged in coaling the engine, and, when he finished, he saw the children sitting on the trestle, 40 or 50 feet ahead.

Going no further, taking these facts and the statements of these trainmen, I say that the inference that the children were sitting on the trestle some time before the coming of the train is more reasonable than that they suddenly appeared upon it, just before they were struck. And remember, in doubt, we must make the inference most favorable to the demurree. The engineer does not contradict this inference by telling us that he did see them all at once go upon the trestle. The inference does not necessarily flow from his evidence that they did all at once go upon the trestle. Unless there is a decided preponderance of probability or reason in favor of this sudden coming of the children upon the trestle, we cannot make it, but must make the other, under a demurrer to evidence. But add other evidence: A witness says he passed over this trestle, and saw the children sitting upon it, and the train came in perhaps, 15 minutes, he thought, but was not certain as to the time. There they were sitting when he last saw them. There they were sitting when the locomotive struck them. May we not say, there they were yet sitting when it struck them? Had they ever moved? Counsel argues that we cannot make this inference because the uncontradicted evidence of the engineer and fireman is that they were on the lookout, and did not see the children, and we cannot draw inference against positive evidence. But the facts argue against this. The fireman had not looked for a fourth of a mile till he got within 45 or 50 feet, when he saw them. The engineer might have looked, but failed to see. The children might have been there nevertheless. He says the morning was foggy. If so, that would

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likely prevent his seeing : but discard that, as in conflict with several witnesses who say it was sunshiny and bright. The engineer says that willows shaded the trestle. That might have prevented his seeing the children, and yet they be sitting there. But other evidence contradicts him as to the willows shading. Bear in mind that as yet we are confining ourselves to the question whether those children were on the trestle so as to be seen some time before the casualty, not upon the question whether the engineer did see them, or whether he used diligence and failed to see them. We, therefore, conclude that it is fair upon this evidence to say—at least not unfair or unreasonable to say—the children were on the trestle so as to be seen long enough before the train came, to be seen and saved, so far as distance is concerned.

But the defendant would still say that the evidence shows a careful lookout, and, if the children were there, they were not seen by this careful lookout, and that ordinary care is all that can be demanded, and, if it fails, the company is not responsible. They say the evidence showing this ordinary care to avoid calamity is uncontroverted, and we cannot find in its face a want of ordinary care. We do not say they were seen and purposely hurt, but was there due care? Was there that care required by law? This is now our question, seeing that those children were upon that trestle, and the deadly train approaching them. There was a curve in the road, and between the curve and the trestle a straight level track, with clear view for full half a mile ; and the morning, a clear bright morning of June, the time 8 o'clock, the children (two of them) sitting on a guard rail on a trestle, clearer to view, perhaps, than if elsewhere on the track, and the engine such as was capable of stopping the train in its own length, the fireman said, a witness for plaintiff, though the engineer, a witness for defendant, denied this. Now, it would be pretty lenient under these circumstances, so favorable for seeing and saving these children, and pretty dangerous as a rule, to say there was all due

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care. But here an important consideration enters into this question of the presence or absence of due care, and this that it is one of fact, proper for a jury; so, also, what was a fair inference from all the circumstances as to when the children were first on the trestle; so, also, the credibility of witnesses as to seeing the children, and of watchfulness. A jury is to judge of the weight of evidence, and make inferences and deductions. Now, suppose there had been a verdict for the plaintiff. Could we set it aside? We do not think we could. Then the rule of decision upon a demurrer to evidence would require judgment upon it for the plaintiff. There is stronger reason for holding the company for want of a close lookout, and more opportunity to discover the children, than was the case with the mule in *Heard v. Railroad Co.*, 26 W. Va. 455, and that was not on a demurrer to evidence, while this is.

The counsel of defendant seeks to relieve it from liability because of imputed negligence; that is, that as the father and mother of these children allowed them to go about the track, and thus expose them to danger, and as the father is sole distributee of his child, and will get the money recovered, the suit cannot be maintained, as his negligence is imputed to the child. But we do not think that, if that doctrine be good law, a sufficient basis exists for its application. There was not that omission of ordinary care as persons of ordinary prudence deem adequate care with their children. *O'Flaherty v. Railway Co.*, 45 Mo. 70. The parents of these children seem to be poor, and therefore unable to employ a nurse to attend and guard their children—a fact bearing on the degree of care demandable of them. Though living near the railroad, yet not so near (300 or 400 yards) as to require such close constant watch. They warned their children against going on the railroad. They did know that they had on one or more occasions been on the track, and warned them against going there, and the father

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once whipped this little boy for doing so. The mother sent them that morning to turn the cows up the road, and come back by the corn lot and garden,—a different direction from the trestle, I understand. They could not pen or imprison their children from light and air and exercise and play. They could not always keep unfailing watch upon them. That degree of negligence is not shown which would warrant us in denying recovery on this ground. This renders it out of place to discuss the question of imputed negligence; that is, that, though no negligence could be charged to the child, yet, as the parent was negligent in exposing him to danger, that shall be imputed to the child, and made his negligence, and forbid recovery by merely the representative of the child. This doctrine began in the supreme court of New York in 1839, with *Hartfield v. Roper*, 21 Wend. (N. Y.) 615, holding that where a child of tender years is in a highway unattended, and is run over by a traveler, the traveler is not liable to even the child, unless the injury was voluntary or from culpable negligence, because the law attributed the negligence of the parents in allowing the child to be in a place of danger to the child, so as to prevent recovery by the child. Since that case the subject has undergone elaborate and refined discussion in the courts, and the conflict is intense. Some courts repudiate it; some adhere to it. It is said to be now against the weight of authority. Virginia has repudiated it in *Railroad Co. v. Ormsby*, 27 Gratt. 455, and *Railroad Co. v. Groseclose*, 88 Va. 267. From the reading I have done in an incomplete examination of this point, my individual opinion is that, where the child is living and suing, the negligence of the father cannot be imputed to it to affect its action; but where the child is dead, and the father is, by law, sole distributee of the child, as he gets the recovery, and is guilty of the negligence producing the accident, that will bar recovery, no matter who is administrator, unless the defendant's act be willful or wanton. Of course, where the father sues for loss of his child's service, his own negligence will bar

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him. See Beach, Contrib. Neg. § 42; 1 Shear. & R. Neg. § 74; Bish. Noncont. Law, § 352; 4 Am. & Eng. Enc. Law, 88; Wymore v. Mahaska Co., 78 Iowa, 396, citing the many conflicting cases; Casey v. Smith, 152 Mass. 294; Westbrook v. Railroad Co., 66 Miss. 560, Railway Co. v. Vining, 27 Ind. 513; Railroad Co. v. Snyder, 18 Ohio St. 399, 98 Am. Dec. 175, and note; note to Freer v. Cameron, 4 Rich. L. (S. Car.) 228, 55 Am. Dec. 677; Ihl. v. Railroad Co., 47 N. Y. 317; Grant v. City of Fitchburg, 160 Mass. 16; Wiswell v. Doyle, 160 Mass. 42; Johnson v. Railway Co., 160 Pa. St. 647. Judgment reversed, and judgment for plaintiff on the demurrer to evidence.

On Rehearing.

I have always regarded this case as one which lawyers call "a close case." We, therefore, granted a rehearing. An able reargument has not changed the result expressed in the above opinion. I repeat what is said in that opinion, that imperious necessity demands that railroad companies, through their employees, keep careful lookout for people and obstructions on the track. Railroads must be accorded a place on the face of the earth to answer the needs of society, but all the people must also use the face of the earth, and we must adopt rules preservative of the rights of all, so far as is practicable. It is a high necessity, looking to the safety of passengers and other people, that those in charge of trains, flying with lightning speed through great stretches of country, shall keep such lookout to discover obstructions and persons disabled from infancy or other cause, found on the track. JUDGE HOLT emphasized this in Dicken v. Coal Co., 41 W. Va. —, 23 S. E. Rep. 582, in saying that railroads of all kinds have found by experience that unrelenting watchfulness is requisite to keep tracks safe and clear and they must act on the assumption that they may be brought in contact with children and adults. Can we find that such watchfulness was exercised in this case? That is the crucial question. It is fairly plain that, under the evi-

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dence, we must find that the children were sitting on the trestle long enough before the engine struck them to have been seen and saved, had a due lookout been kept; but, having so found, the next question is, was there a proper lookout? This is the more difficult question. The children were killed, but that alone is not enough to charge the company, unless it was negligent, and, to show that, it must appear that they could have been seen by the trainmen a sufficient distance from the place of disaster, so that the train could have been stopped. Wood, Ry. Law, 1475. And just here counsel tell us that, by the uncontradicted evidence of the engineer and fireman, a watch was kept, without discovery of the children until within 50 feet of them, and that we cannot say, therefore, that such watch was not kept.

This brings up the question whether a court, upon a demurrer to evidence, is bound infallibly to take for true a statement of a witness upon a given fact, only because no witness contradicts him in that statement. The rule is that, upon demurrer to evidence, the court rejects only the oral evidence of the demurrant that is not contradicted or impeached? But what do you mean by contradicted or impeached? Do you limit the contradiction to contradiction by witnesses? Suppose facts and surrounding circumstances contradict him as to the particular fact, though no witness in words does. If a man who is required to watch in order to see an object says he did watch but did not see it, when we know the object was there to be seen, and visible and there was no obstruction to sight, and plenty of light, are we bound to say that he did watch, and failed to see? When two children are on a railroad track in broad daylight, and an engine is approaching them, with nearly a half mile of unobstructed level track in which to discover them, and a trainman says he looked out that distance without seeing them, is a court bound to say that he did keep such lookout, and did not discover them, merely because it is upon a demurrer to evidence, when a jury need not have so found? We cannot here

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reject the witness, nature telling us that the sharp eye of an engineer, more surely than the unpracticed eye, will almost certainly see, in bright daylight, a rock, log, or person ahead on a level, unobstructed track. These considerations answer the question of counsel as to what facts justify the conclusion that the children could have been seen when the train was three or four times as far away as when the engineer and fireman first saw them. Counsel rely with confidence on the statement of the engineer that he watched carefully, and that no evidence contradicts him. No witness does; but how as to other settled facts and circumstances? Shall we forget them? When it is said that, on demurrer to evidence, the party demurring waives his evidence that is contradicted by that of his adversary, we do not mean that if the demurrant has a witness deposing to a given fact, and the demurree has no witness contradicting that particular fact, the court must take that fact as proven by an uncontradicted witness, ignoring other facts and circumstances going to disprove that fact. A jury could find against that fact on the strength of other facts and circumstances by saying that such facts and circumstances contradicted the witness; and must a court be denied the power which a jury could exercise? Surely not, because it has often been held that, if the evidence be such as, if the jury had found against that fact, the court should not set the verdict aside, then a court upon a demurrer to evidence, ought to find against that fact. In such case the evidence of the witness is not regarded as uncontradicted. So that the contrary of the particular fact stated by him is fairly inferable from all the facts and circumstances proven by the demurree. His evidence is deemed contradicted, under the rule of demurrer to evidence that demurrant waives "all his evidence that at all conflicts with that of the other party, admits the truth of his adversary's evidence, admits all inferences of fact that may fairly be deduced from that evidence, and submits it to the court to deduce such fair inferences." *Clopton v. Morris*, 6 Leigh, (Va.) 278.

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It is only that evidence of demurrant that does not conflict with the evidence of his adversary, nor with the fair and reasonable inferences from it, that is regarded. In *Green v. Judith*, 5 Rand. (Va.) 1, 19, 20, Judge Carr laid down principles solving more nearly the exact point we have than any case I see, saying: "What part is he to be considered as waiving? First. All that contradicts that which is offered by the other party; that is, for instance, where a fact is proved circumstantially on one side to be so, and on the other side to be otherwise, this latter, being the demurrant's evidence, must be waived. * * * The demurrant cannot say: 'It is true, according to the evidence against me, I ought to admit so and so, as you demand, but my evidence shows I ought not; for, according to it, the fact is otherwise, and my witness is not impeached.' He must waive his evidence, or the court must do it for him, as to this matter." Apply these principles in this case. The nature of the case, its circumstances, show that the children could have been seen by a careful lookout in time to save them, and a jury could say, and we can say, there was no lookout; but because a witness says there was, and he is not specifically contradicted by another witness saying the former did not look ahead, but was talking or looking in another direction, we must say he did look ahead, though the natural facts tell us he could have seen the children had he been looking. The rule of demurrer to evidence says the demurrant waives that evidence; that is, the court disregards it. The plaintiff's showing, standing alone, denies that there was such lookout, and a jury could on it have so found, and, if had, we could not set the finding aside; and shall we deny the plaintiff the benefit of a finding which he might have lawfully secured by a jury, when the defendant has withdrawn the case from a jury? That is the test, and the cases say not. *Fowler v. Railroad Co.*, 18 W. Va. 579.

And here, upon cases cited in the above opinion, I repeat that upon a demurrer to evidence, in determining facts from evidence, where there is grave doubt,

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those inferences and conclusions most favorable to the demurree will be adopted ; and, unless there is decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made in his favor ; and if the evidence is such that, if there were a verdict in his favor, the court ought not to set it aside, then, on such demurrer, the court ought to give judgment in his favor. Speaking for myself, I do not think that Acts 1891, c. 100 (Code 1891, c. 131, § 9), relates to demurrer to evidence. It was not designed to revolutionize the law of demurrer to evidence by reversing the rule that the demurrant waives his oral evidence contradicted by evidence of his adversary ; and my reasons for this opinion are (1) that, before that act, all evidence upon such demurrer was certified, and hence the statute was not needed to bring up evidence in that instance ; and (2) because, by demurring, the demurrant takes the case from the jury, and deprives his adversary of the right to have it pass on the evidence contradicting his evidence, including the credibility of witnesses. To hold that he gives up no evidence enables demurrant, at will, to take the case from the jury, and have the court to give him full benefit of evidence that is contradicted ; which a jury would have discredited or deemed of little effect. Did this act mean to make a jury out of a court as to conflicting evidence on a demurrer to evidence ? I think not. Hence, I think, section 4 of syllabus in *Mapel v. John*, 42 W. Va. —, 24 S. E. Rep. 608, saying the demurrant waives no part of his evidence, is not tenable. Some may regard it peculiarly hard on railroads to hold them responsible for killing children on the track, on the theory that they own and should have absolute control of their track ; but if any of us traveling an ordinary highway, or a farmer in his own field, were to drive a vehicle over a child when he could have been seen, and the injury avoided, the person doing the injury would be liable.

As to imputed negligence of the father : We do not regard the facts as sufficient to debar his recovery, and

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I shall add nothing as to that to what is said in the original opinion. The facts, therefore, do not squarely raise that question; and, where neither party can be affected one way or the other by its decision, we need not discuss the question. *Stribling v. Coal Co.*, 31 W. Va. 82.

RATHGEBE

v.

PENNSYLVANIA R. CO.*

(Supreme Court of Pennsylvania, Jan. 4, 1897.)

Injury to Passenger at Station—Contributory Negligence—Question for Jury.—A person boarding a train passed over the sloping part of the platform to the train, instead of going down the steps, and fell and was injured. *Held*, that the question of her contributory negligence was for the jury.

Admission of Incompetent Evidence—Harmless Error.—Where there was no good reason for believing that the defendant would be or was prejudiced by testimony which was withdrawn before argument, and in regard to which the jury received positive and proper instructions from the court, the admission of such evidence furnishes no ground for continuance or for reversing the judgment.

APPEAL from Westmoreland county court of common pleas. *Affirmed.*

Gaither & Woods, for appellant.

Robbins & Kunkle, for appellee.

McCOLLUM, J. This action was brought to recover damages for personal injuries alleged to have been received by the plaintiff on the 19th of January, 1893, through the negligence of the defendant.

Case Stated.

It was conceded on the trial that the plaintiff fell and was injured while walking from the waiting room to the train, but there was a conflict in the evidence as to the place where she fell. The plaintiff claimed that she fell on the slope, while the defendant claimed that

*See note at end of case.

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she fell on the platform between the side track and the Sewickley track. The defendant's claim involved an admission that the plaintiff's fall was caused by the ice on the platform between these tracks, but it did not necessarily convict the defendant of negligence, because it was shown and undisputed that this ice must have been formed from the water which leaked or was splashed upon it from the water cars which passed on the Sewickley track but a few minutes before her fall. The evidence submitted by the defendant was mainly directed to this line of defense, and the learned judge of the court below substantially charged the jury that, if it was credited by them, the plaintiff could not recover.

The plaintiff claimed that the defendant was chargeable with negligence in the construction of the station platform, and in permitting an accumulation of snow and ice upon it. The length of this platform from the west end of the station to the freight platform, and in front of the ticket office and waiting room, was about 50 feet.

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Along the whole length of it, facing the track, it was 10 or 12 inches higher than the track platform. For at least three-fifths of the length of the station platform there was a slope from it to the platform below. The width of the slope was about 3 feet, and at each end of it there was 9 or 10 feet of platform, terminating in a 10 or 12 inch step. Passengers, in going from the waiting rooms to the trains, would have to pass over this step or over the slope. They were not limited, by any order or direction of the defendant, to either route, but were at liberty to pass over any part of the platform on their way to and from trains. The evidence showing the construction of the station platform was sufficient to charge the defendant with negligence in this particular, and the evidence in regard to snow and ice upon it warranted an inference that the defendant had negligently permitted them to accumulate there. But the defendant claimed that, if the plaintiff slipped and fell on the slope, she was not

Note.

entitled to recover, because, in the then existing condition of the platform and its approaches, she was chargeable with contributory negligence in passing over it. The court was requested, but refused, to direct the jury to find for the defendant on this ground. Did the court err in refusing to grant this request? We think not. The question whether the plaintiff was negligent in passing over the slope on her way to the train was, under all the evidence in the case, for the jury. The instructions in regard to contributory negligence and the effect of it upon the plaintiff's case were unobjectionable and clear. The fact that her husband "cautioned her to be careful, as the platform was slippery," and that "she answered that she would be careful," was not a confession of carelessness, or that there was a better route from the waiting room to the train.

A number of witnesses were permitted to testify that the platform and approaches from the station to the tracks were dangerous, but on the request of the defendant's counsel, and before argument, this testimony was stricken out and withdrawn from the consideration of the jury. It is now contended that the court erred in denying the motion of the defendant's counsel to withdraw a juror and continue the cause.

Admission of In-
competent Evidence
—Harmless Error.

The admission of incompetent evidence, and the subsequent withdrawal of it before argument, furnishes in itself no ground for continuance, or for reversing the judgment. *McGettigan v. Potts*, 149 Pa. St. 155; *Canal Co. v. Barnes*, 31 Pa. St. 193; *Railroad Co. v. Butler*, 57 Pa. St. 335; *Railroad Co. v. Smith*, 125 Pa. St. 259; *School Furniture Co. v. Warsaw Tp. School Dist.*, 158 Pa. St. 35. In the case before us there was no good reason for apprehending or believing that the defendant would be or was prejudiced by the testimony which was withdrawn before argument, and in regard to which the jury received positive and proper instructions from the court. Judgment affirmed.

NOTE.

While it is the duty of a company to provide safe and reasonably convenient means of ingress to its cars, it is equally the duty of the

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passenger to use the means provided, with reasonable circumspection and care. *Keller v. Hestonville, M. & F. Pass. R. Co.*, 149 Pa. St. 65; *affirming* 1 Pa. Dist. 197.

In an action by a husband and wife against a company, to recover damages for injuries to the wife caused by defective steps to a platform to which a train had backed, and which was not the usual place for passengers to get on and off the cars, the jury should have been instructed to ascertain from the evidence whether the company had designated or set apart the platform in front of the depot as the place where it required all passengers to enter the cars; if so, and this was known to the plaintiffs, and they, in disregard of such requirement, in advance of time, and without any justification, sought to enter the cars at another place, and in so doing met with injury, then the company would not be liable as common carriers. *McDonald v. Chicago, etc., Ry. Co.*, 26 Iowa 124. If there was no such rule or regulation known to the plaintiffs, and they, in good faith and using reasonable care, were seeking to find and enter the cars, the company would be liable, as the plaintiffs would have a right to presume that the platform and its approaches were in a safe condition. *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124.

PAYNE

v.

CHICAGO & A. R. Co.

(*Supreme Court of Missouri, Dec. 23, 1896.*)

Accident at Crossing—Testimony—Credibility.—In an action against a railway company to recover for damages, all of the witnesses testified that the track in the direction from which the train came was visible for a distance of 500 yards to a person standing within 20 feet of the crossing, and that they did not see the train strike any one, though they watched it. It appeared that the engine gave the customary signals for the crossing, that the headlight was burning brightly, and that the engineer and fireman were at their posts. The plaintiff, a boy of eleven years old, having sound hearing and eyesight, was familiar with the crossing, and testified that he was expecting such train, and that he stopped before crossing the track, and looked and listened, but failed to hear or see the train. *Held*, that a verdict for the plaintiff based on his testimony would not be sustained, as obvious and indisputable facts could not be overthrown by such testimony.

Accident at Crossing—Contributory Negligence.—Where a boy eleven years old, having his faculties, attempts to cross a railway track before a train, he is guilty of such contributory negligence as to prevent a recovery for injuries received thereby, even though the railway company was guilty of negligence in running its train at a greater rate of speed than was permitted.

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Same—Admission.—Where there is evidence in such case that the plaintiff was not run over while crossing the track, but that his injuries were caused by his putting out his hand to catch hold of the train as it passed, and such testimony is not denied by the plaintiff, it will be held that such testimony was admitted by the plaintiff, and will prevent a recovery for his injuries.

IN BANC. Appeal from Lafayette county circuit court. *Reversed.*

Geo. Robertson, for appellant.

John S. Blackwell, J. D. Shewatter, and M. C. James, for respondent.

SHERWOOD, J. The plaintiff, who is a negro boy, sues by next friend for injuries received by him as the result of being run over by a train of defendant's cars in the city of Higginsville, in the evening of the 6th of May, 1892, at about 8 o'clock. At that date plaintiff was 11 years of age. The jury, after hearing the evidence, returned a verdict in favor of plaintiff for \$8,000. At a previous trial he received a verdict for \$6,000. The city of Higginsville, in the county of Lafayette, was a city of the fourth class, and had an ordinance in force limiting the speed of railroad trains to a rate not exceeding six miles per hour. The defendant's railroad runs through the city, from east to west, in a southwesterly direction, crossing Russell street, the principal street of the town. Russell street runs through the principal part of the town, north and south. Beginning on the north, it runs up to the railroad, crossing the right of way of the defendant, then turns slightly to the west, and continues on to the south side of the town. Defendant's main track and side track are both crossed by Russell street, the main track being on the north side. There is no sidewalk on the west side of Russell street approaching this crossing. There is a sidewalk on the east side of Russell street, extending from the business part of the town, on the north side of the railroad, directly up to the defendant's right of way, then on defendant's right of way to the main track, and continues clear across to the south side of the right of way, and continuing on the east side of

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Russell street south. The defendant's depot is situated north of the main track, and about 50 feet east of Russell street, and on the north side of the depot building is a platform, which continues west until it reaches this sidewalk on the east side of Russell street, where the platform and sidewalk join on a level. The first building north of the defendant's right of way, and on the west side of Russell street, is the Arcade Hotel, in front of which there is a veranda. The sidewalk in front of the hotel is on a level with the sidewalk running from the hotel north on the west side of Russell street. Defendant's roadbed, where it crosses Russell street, is about $2\frac{1}{2}$ or 3 feet above the level of the sidewalk and street in front of the Arcade Hotel, and this roadbed is also some higher than that part of the street on the south side of the railroad. There is also a crossing over the railroad one block west of Russell street, and one block east of Russell street. The railroad from Russell street crossing continues west on a straight line 1,500 feet, and about 900 feet west of this crossing, on the north side of defendant's right of way, is a mill; and about 300 feet west of Russell street crossing there begins a switch, on the north side of the track, running to the mill, called the "Mill Track." There is no building on the north side of the railroad and on the west side of Russell street nearer to the track than the Arcade Hotel, and west from it there are no buildings until the mill is reached. Standing at a point in Russell street, and on the sidewalk on the east side of the street, and back 20 or 30 feet north of the railroad, a train can be seen approaching from the west for a distance of 1,500 feet, and standing at any point on this sidewalk in Russell street, looking west, until the view is shut off by the Arcade Hotel, a train may be seen approaching from the west 500 yards. At the time of this accident there were no cars on the mill side track nor on the side track south of the main track. This side track crossing Russell street is about 6 or 8 feet south of the main track. At about 8 o'clock on the evening of the 6th day of May, 1892, defendant's pas-

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senger train, called the "Hummer," approached this crossing from the west at a rate of speed varying, according to several witnesses, from 20 to 35 miles per hour. The whistle was sounded for this crossing at the usual place; the bell rung, and kept ringing, as it approached the crossing, and over the crossing, and continued ringing through the town; and the headlight of the engine was burning. According to several witnesses it was not yet dark, but was dusk or twilight, but a person could be seen and recognized for a considerable distance. After this train had passed, the plaintiff, a negro boy 11 years of age, was found lying, 15 or 18 feet east of the Russell street crossing, between the main track and the side track of the defendant, with both of his legs cut off, which was supposed to have been done by the train.

The engineer, Jones, and the fireman, Eikhurst, were each on their respective sides of the engine, looking forward, at the crossing; saw no one on the crossing, and saw no one struck; and did not know that any one was hurt by the train until they received information of it at Slater, the end of their run, where they examined their engine, and found no signs of blood upon it. W. S. Dorn Blaser, a witness on the part of the plaintiff, crossed the track at this crossing from the south to the north, and stopped about 12 feet north of the main track on the sidewalk, and watched the train until it passed over Russell street crossing, and saw it strike no one. James Jackson, a witness on the part of the plaintiff, was standing east of the crossing, on the depot platform, about 10 or 12 feet east of the sidewalk; heard the train whistle, and the ringing of the bell; saw it approach the crossing and cross over it; and saw no one on the crossing, nor saw the train strike any one. Floyd Smiley, a witness on the part of the plaintiff, was standing on the depot platform, in front of the depot; saw the train approaching from the west; saw a boy, or some boys, crossing over the track when the train was about 200 or 300 feet west of the crossing; continued to look at the engine and the

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train until it had gotten over the crossing; and saw it strike no one. Mrs. Carrie Ellis, a witness on the part of the defendant, walked from the north side, on the sidewalk on the east side of Russell street, up near to the crossing; stopped within a few feet of the point where the sidewalk crossed over the main track, and waited until the train passed; noticed two black boys pass her, but did not notice them after passing her. She watched the engine until it had passed entirely over the crossing, and saw it strike no one. R. C. Mosby, a witness on the part of the defendant, was in front of the Arcade Hotel, looking directly at the engine as it passed over the crossing; noticed the engine all the time it was going over the crossing; saw no one on the crossing, and saw it strike no one. James Dorn Blaser was standing in front of the Arcade Hotel, saw the engine and train pass over the crossing, but saw no one on the crossing, nor saw it strike anyone; but, just before the engine entered upon the crossing, he saw a colored boy, who looked to be 12 or 13 years old, approaching the crossing from the south side of the track, but the engine and the train passed between him and the boy, and he saw him no more. When he first saw the boy, the train had not yet come into view. William Chinn, a witness on the part of the defendant, was seated in front of the Arcade Hotel, and noticed the train pass over the crossing. He looked under the cars, and saw a boy on the south side of the train "making motions, and seemed like he was catching to the train or something." John Bowman, a witness on the part of the defendant, approached the crossing from the south side of the sidewalk, and, seeing the train approaching from the west, stopped, and waited for it to pass over the crossing. While standing there, he saw this boy, the plaintiff, make a grab for the banister of the steps of about the third car, and saw him jerked under the train. The boy, at the time of grabbing for the train, was on the east of Bowman on the sidewalk. Of all of a great number of witnesses, both for the plaintiff and defendant, who saw the train pass over

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the crossing on that evening, no one saw the plaintiff struck on the crossing; and all of the witnesses say that no one was struck upon the crossing.

C. D. Taylor was attracted by the noise of the boy immediately after the passing of the train; went to the boy; found him lying outside, between the main track and the switch track of the crossing,—*i. e.*, on the south side of the main track. William Rutherford was near the crossing when the train passed; was attracted by the noise of the boy; went to him, and found him lying about 20 feet from the crossing, between the switch and main track. Rutherford and Taylor reached the boy about the same time. Both of them asked him what was the matter, and how he got hurt, and he said to Rutherford that he was putting out his hand, or putting it on the train, and it ran over him; to Taylor, that he was holding out his hand to the train, and that it ran over him. They picked him up, and placed him on the platform of the depot. Dr. Webb, who treated the boy, asked him several times how he got hurt; and he always answered the same way, and told him, "I don't know."

The testimony of Claude Payne, the plaintiff, covers some 10 pages. It is made up largely of questions and answers, and frequent repetitions of the same. The substance of it may be stated in a small compass. It is to this effect: Plaintiff (whose mother lived four blocks south of the crossing in question), on the evening heretofore stated, being sent by his mother to the postoffice, went north along Russell street until he came to the Russell street crossing. When he reached that point, he looked out for a train,—looked up and down the tracks; and the reason he did this was because he was afraid of the train, that it would hurt him unless he watched out for it. Seeing no train, he crossed the tracks, continued north to the postoffice, did his errand, and started back home, returning on the same street. When he reached the railroad crossing he again looked up and down the track, because he thought it dangerous to cross there without doing so. First, he looked west or down towards the mill, because he

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was expecting the "Hummer" to come, but he "did not hear no train," did not hear the whistle blown or the bell rung, nor did he see any train, nor see any headlight, though he knew what it was, and then, when he got on the track, and started across, the train ran over him. But this train, he says, he did not see either before or after he was struck, though he says it was the "Hummer" that struck him. What part of the train ran over him does not appear, and he does not state nor pretend that he was struck by the engine or cow-catcher. He testified, also, that he had on one occasion traveled on a train from Higginsville to Aulville, some 5 miles; had assisted his grandfather in various kinds of farm work. He also testified that he had attended school in Higginsville for some time, and in attending school he crossed the railroad track at the Russell street crossing.

Fannie Payne, the mother of the boy, testified that the boy was 11 years of age; that he was familiar with the crossing and the railroad track; that he lived on the south side of the railroad, and the schoolhouse which he attended was on the north side of the railroad; that he had attended school as often as three sessions, two or three months at a session, and had daily crossed over the track to and from the schoolhouse; that he had ridden upon the cars; that a part of the time the boy had lived in the country with his grandfather, and, while in the country, at his grandfather's, he helped his grandfather cut brush, burn brush, drop corn, cover corn, cut weeds, feed horses and curry them, and that, while there, he made a hand at work. She further testified that he was a healthy boy; had a good mind, good hearing, and good eyesight; was active in his movements.

1. Aside from the testimony of the plaintiff himself, there is no room for doubt or question, testified to as it is by all of the witnesses, both on the part of plaintiff and defendant, who were in a position to see and to hear it. that, to a person standing on or within 20 feet of the crossing, on the north side of it, the view of the track

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to the westward of the crossing was clear and unobstructed for the distance of 500 yards, and there were no cars on the side track to obstruct this clear and unobstructed view. The engine had whistled for the crossing. The headlight was brightly burning. The bell was ringing, and the train was on time. The engineer and fireman were at their respective posts. The train was making the usual noise, and plaintiff was expecting that very train. But he alone, of all others, when he went to cross the track, though a bright, active boy, with a good mind and eyesight, and acquainted with the locality and with the dangers incident to crossing the track, though he listened, could not hear the whistle blown, nor the bell constantly ringing, nor the rumble of the train, nor see, with his good, young eyes, the blazing headlight of the train as it rapidly advanced upon him. Such testimony as this is so contrary to the daily experience of common life, so at war with the conceded and indisputable physical facts in this case, that neither courts nor juries can, without stultifying themselves, yield to it an iota of probative force or effect. It is a proposition too monstrously improbable for rational human belief. To argue to the contrary of this is to endeavor the transmutation of the impossible into possibility. However, in this *fin de siècle*, this questioning age, when axiomatic truths are doubted daily, and propositions wholly improbable are put forward with the most audacious assurance, it may not be amiss to cite and quote from courts and text writers of the highest respectability when treating of circumstances in all substantial respects similar to those presented by the case at bar. "When one approaches a point upon the highway where a railway track is crossed upon the same level, it is his plain duty to proceed with caution; and, if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assump-

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tion. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all the courts enforce this reasonable rule. It is also consonant with right, reason and the dictates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life, that it should seem to be scarcely dependent upon the authority of decided cases in the law courts." Beach, *Contrib. Neg.* (2d Ed.) §§ 180, 181. In many cases in this court, parties injured, or their representatives, have been denied a recovery because of failing to observe the precautions mentioned in the sections just quoted. *Harlan v. Railroad Co.*, 64 Mo. 480; *Id.*, 65 Mo. 22; *Fletcher v. Railroad Co.*, 64 Mo. 484; *Henze v. Railroad Co.*, 71 Mo. 636; *Purl v. Railway Co.*, 72 Mo. 168; *Turner v. Railroad Co.*, 74 Mo. 602; *Hixson v. Railroad Co.*, 80 Mo. 335; *Fox v. Railroad Co.*, 85 Mo. 679; *Kelly v. Railroad Co.*, 88 Mo. 534. In Michigan, an instruction in this form has met with frequent approval: "The track itself is a warning of danger to those who go upon it, and persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and, if either cannot be rendered available, the obligation to use the other is the stronger to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and, if they neglect to do this, but venture blindly or carelessly upon the track, without any effort to ascertain whether a train is approaching, it must be

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at their own risk. Such conduct is of itself negligence." *Mynning v. Railroad Co.*, 59 Mich. 257. and cases cited. In *Allen v. Railroad Co.*, 82 Me. 111, the supreme court of Maine says: "The evidence shows that, at 25 or 30 feet distant from the crossing, the approaching train from Bath might have been seen by the plaintiff several hundred feet distant from the crossing. The plaintiff did not look in that direction until his horse's fore feet were between the rails. Was the neglect on his part to look in that direction a want of ordinary care and prudence? Is a traveler justified in driving upon a railroad crossing, in the absence of safety signals giving him the right to cross, without looking for an approaching train? It has been many times decided in this state that the traveler, before crossing a railroad, must both look and listen. * * * If the crossing at which the plaintiff was injured is so constructed that an approaching train cannot be seen until a traveler comes very near to the railroad track, common prudence requires him to approach at such speed that, when an approaching train may be seen, he may be able to stop, and allow such train to pass." In a crossing accident case in Indiana, it is said by the supreme court of that state: "The third instruction would have informed the jury, had it been given, that a railroad track is of itself a warning to those who go upon it, and that persons about to cross it are bound to recognize the danger, and to make use of the sense of hearing as well as that of sight—and, if either cannot be made available, the obligation to use the other is the stronger—to ascertain, before attempting to make the crossing, whether or not a train is in dangerous proximity; and, if one neglects to do this, but carelessly ventures upon the track, and is injured, it must be at his own risk; that such conduct is sufficient of itself to defeat a recovery. This instruction stated the law correctly. All persons who are acquainted with the manner in which railroad companies operate their trains over their lines of railroad know that there is always more or less danger in going along or across

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a railroad track ; that there is always danger from a passing train ; that safety requires that both the sense of sight and hearing must be exercised vigilantly to ascertain if a train is approaching ; and, hence, a failure so to do would constitute negligence. This, we think, is self-evident. And, if the circumstances are such that but one of the senses can be exercised, it is evident to any one that the sense which can be exercised should be employed with still greater vigilance. * * * If a crossing is particularly dangerous, and requires extraordinary effort to ascertain whether it is safe to attempt to pass over it, one familiar with the locality and danger surrounding it must use care proportioned to the probable danger. This instruction unquestionably stated the law correctly. The greater the danger, the greater must be the care exercised. * * * The question of contributory negligence did not depend upon what the appellant's employees did or did not do, but upon what the appellee's servant did, in the light of the *res gestæ*. We are at a loss to understand what difference it could make, as to the caution to be used by the appellee's servant, whether there was or was not a statute requiring the giving of signals. It was his duty to stop and look for an approaching train, if there was any point within a reasonable distance from the crossing from which he could observe a train approaching ; and if no train was to be seen, it was his duty, when nearing the crossing, to stop and listen for the sound which ordinarily follows a moving train ; and a statute requiring signals to be given, though violated, does not excuse this vigilance." *Railroad Co. v. Stommel*, 126 Ind. 35.

Counsel for plaintiff, however, asserts that "when the boy reached the railroad, on his return home, it was about dark, and he did all in his power to ascertain whether there were any trains approaching from either the east or west, and not seeing any and not hearing any, he started across, and, while crossing he was struck by one of defendant's trains running through said city and over said crossing at the unlawful, reck-

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less, negligent, and dangerous rate of speed of from 35 to 40 miles per hour." But in this instance it is plainly proved, beyond peradventure, that this statement of plaintiff "that he did all in his power to ascertain whether there were any trains, approaching," etc., was not, and indeed, could not, be true. This matter of denying probative force even to direct and affirmative testimony, when such testimony is plainly at war with the physical facts and surroundings, has passed into precedent. Thus, in the leading case of *Artz v. Railroad Co.*, 34 Iowa 153, it is said: "But it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or at the very least, it made that a question of fact for the jury. The difficulty, however, with the position, is that the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify that, at the time, he looked and did not see it shine. Could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look, and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so, and this belief may have ripened into a conviction of its verity; and, possibly, he even may testify to it in the self-consciousness of integrity. But, after all, in the very nature of things, it cannot be true, and hence cannot, in the law, form any basis for a conflict upon which to rest a verdict. A man may possibly think he sees an object which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist or was not seen. But, an object and power of sight being conceded, the one may not negative the other. In this case the plaintiff had good eyes. The train was approaching him in the night, with the engine's head-

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light burning brightly. If the plaintiff looked, he must have seen it, or he must have looked very negligently and carelessly. In either case, he was necessarily, in the eyes of the law, guilty of contributory negligence, precluding his right to recover." So, also, in *Marland v. Railroad Co.* (Pa.) 16 Atl. Rep. 623, speaking of the present matter under investigation, the supreme court of Pennsylvania said: "On the trial of this case the plaintiff testified that he stepped upon the track, and was instantly struck and injured. It is true, he said, he looked up and down the track, and saw nothing; but it is necessarily true, also, that, if he made use of his eyesight, he must have seen the approaching train. He could not possibly look along the track, in the direction of the approaching train, and fail to see it, since his presence on the track and the collision were simultaneous. We have pronounced emphatically upon such facts in several of our recent cases. In *Carroll v. Railroad Co.*, 12 Wkly. Notes Cas. 348, we said: 'The injury received by the plaintiff was attributable solely to his own gross carelessness. It is in vain to say that he looked and listened, if, in despite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive.'" In the more recent case of *Myers v. Railroad Co.*, 150 Pa. St. 386, WILLIAMS, J., said: "The rule is now well settled in this state that one approaching a railroad crossing upon a public highway must stop, look, and listen, at a convenient distance from the railroad track, before venturing to go upon it. This rule is imperative. If one disregards it, and suffers injury in the attempt to cross, the presumption of negligence on his part is a presumption *juris et de jure*. Having contributed to his own injury, he is remediless. If the traveler complies with the rule, and can see or hear a moving train approaching the crossing, what must he do? It follows, logically, from the rule now so firmly established, that he must wait for the approaching train to pass. If he does not do so, he crosses at his peril. * * * If he does not wait, but risks his safety on his own

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calculation of the chances that he will be able to cross the track before the train can reach him, he must not complain of the consequences, if his calculation fails, and disaster overtakes him. * *

* In this case we encounter another question. The plaintiff says he complied with the rule. At about 15 or 20 feet from the track he says he stopped his team, looked each way along the railroad, and listened; and that he neither saw nor heard a train approaching. He then drove on, and, while upon the track, was struck and injured. If this is true, he did all the rule requires, and all that was possible to be done. Is it true? This question the court below left to the jury, and they promptly found that it was true. The defendant asked the court to say, as a matter of law, that upon the facts of this case it was not true. Our question is whether this instruction should have been given. The facts, as shown by the plaintiff's case, are these: (a) The track was straight and smooth and unobstructed, so that, from the crossing, or the point where the plaintiff says he stopped to look and listen, it could be seen for more than half a mile in either direction. (b) The speed of the train was from 10 to 12 miles per hour. (c) The engine was running backwards, with a large reflecting headlight perched upon the top of the tender, facing towards the crossing, and another in its usual place on the front of the engine. * * * It is absolutely certain, from the plaintiff's own testimony, that the headlight upon the tender, at the time he says he stopped, could not have been, on any estimate of the rates of speed, more than 200 or 300 feet away, and in plain view. If he had stopped and listened, he must have heard the noise of the train. If he had looked, the blazing headlight would have confronted him, for it was squarely in his line of vision, throwing its glare over intervening objects, and making the darkness on either side darker by the contrast. The fact that, four or five seconds after he says he looked and listened, he was struck by a train that must have been plainly visible, and almost on him at the time he alleges he looked,

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is so palpably and absolutely irreconcilable with the truth of his statement that he did stop, look both ways, and listen, before driving upon the crossing, that it is trifling with justice to permit a jury to find that it is true. Such a finding is absurd. It is simply and flatly impossible that one can stop, look, and listen for an approaching train that is in plain view and close at hand, and be unable to see or hear it, if he possesses the senses of sight and hearing. It seems, therefore, necessary to advance one step in the application of the doctrine of legal presumption, and to lay it down as a rule that one who is struck by a moving train, which was plainly visible from the point he occupied when it became his duty to stop, look, and listen, must be conclusively presumed to have disregarded that rule of law and of common prudence, and to have gone negligently into an obvious danger. A line of well-considered cases leads fairly up to this conclusion." "If a traveller, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*." Beach, Contrib. Neg. (2d Ed.) § 182. To the same effect see Whart. Neg. (2d Ed.) § 382.

Even in criminal cases, cases involving liberty or life, we have repeatedly ruled that, if a party testifies directly in the face of, and in opposition to, obvious physical facts, neither courts nor juries are bound to stultify themselves by giving credence to such testimony. *State v. Anderson*, 89 Mo. 332; *State v. Bryant*, 102 Mo. 24; *State v. Turlington*, 102 Mo. 642; *State v. Nelson*, 118 Mo. 124; *State v. Brown*, 119 Mo. 527. Myers' Case was approvingly cited and quoted from by MACFARLANE, J., in Kelsay's Case, 129 Mo. 362, where the controlling circumstances were virtually the same, in legal effect, as in the case before us. Of the same substantial import is Hayden's Case, 124 Mo. 566, per BRACE, C. J. See, also, Lane's Case, 132 Mo. 4. Now, look at the pivotal facts preserved

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in this record. Smiley, one of plaintiff's witnesses, when speaking of plaintiff's whereabouts, says: "When I first saw him, he was something like 4 or 5 feet from the rail, and he was going right south, and the train was up there, 200 or 300 feet above, on the track." This witness is not contradicted, but is supported by every other witness who was in a position to see it, that the train was in full view as it advanced down the track. Indeed, it is one of the conceded facts in the case that the train was obvious to every one who, along or near the track, cared to see it, and within hearing of every one, along or near the track, who cared to hear it. This is the positive and uncontradicted testimony of every witness who testified as to seeing or hearing the train. Opposed to this positive testimony is the merely negative testimony of plaintiff, that he did not see or hear the train coming. But, applying the rule heretofore announced by the authorities, supported as it is by the dictates of the most cogent reason, it is wholly immaterial what the plaintiff swears as to his inability to see or hear the train, or what verdict the jury returned, because, when a witness attempts to overthrow by his oath the obvious and indisputable physical facts in a case, that oath is not to be received or regarded as true, nor will the verdict which the jury return based on such oath be accepted for what its name imports,—“a true saying.”

2. But it is contended by plaintiff's counsel that, notwithstanding plaintiff may have been negligent, yet that, inasmuch as contributory negligence is not to be imputed to an infant or “mere child,” in the same way or to the same extent as would be applicable to an adult, therefore, the law of contributory negligence can not be applied to plaintiff because of his age. This contention leads us to recur again to the evidence. The testimony of plaintiff and of his mother abundantly establishes that his judgment and discretion, his ability to take care of himself, were adequate to that task,—indeed, were equal to the judgment and discre-

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tion of the average man of mature years. This being the case, it is difficult to see why the same rule as to contributory negligence should not apply to a boy equal in capacity and intelligence to the average man, as to the danger to be apprehended and guarded against in crossing a railroad track, as as should apply to such man. The reason of the law of contributory negligence being founded upon knowledge of the danger to be apprehended, and capacity and discretion to avoid it, whenever you prove the existence, in equal degree, of those elements and ingredients in an infant which go to make up the responsibility of an adult, you thereby necessarily determine the responsibility of the infant, and his amenability to the same law. In a word, as absence of capacity and intelligence exonerate or exempt an infant from the operation of that law, so the proven presence and established existence of such qualities and attributes in an infant clothes and casts upon him the same responsibility as is possessed by and recognized in an adult. "*Cessat ratio, cessat ipsa lex.*"

This view of the law has recently been announced by this court, in *Spillane v. Railroad Co.*, 37 S. W. Rep. 198, in an opinion delivered per GANTT, P. J., where the plaintiff, an unusually bright boy, a little over nine years of age, was injured by a train at a crossing. Numerous decisions support the conclusion there reached, at least so far as to hold an infant amenable to the law of contributory negligence, and incapable of recovery where, that law being disregarded and disobeyed, the usual incident, resultant injury, occurs. Some of the cases, to be presently instanced, go even to the extent of placing an infant of demonstrated capacity and intelligence on the same plane of responsibility as if an adult.

In *Messenger v. Dennie*, 137 Mass. 197, a boy eight years and nine months old, who, while engaged in the sport of riding upon the runners of sleighs in the public streets, suddenly leaves a sleigh on which he is riding, while it is in motion, in a frequented thorough-

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fare, without looking behind him, and within 30 feet of a horse and sleigh following it, by which he is struck and injured, is guilty of such negligence as to preclude him from maintaining an action for the injury. And it was ruled in that case that, on the facts proved, the plaintiff should have been denied a recovery as a matter of law.

So, too, in *Twist v. Railroad Co.*, 39 Minn. 164, 37 Am. & Eng. R. Cas. 336, an intelligent boy, 10½ years old, and quite conversant with the danger he was incurring, being injured, was held guilty of such contributory negligence as a matter of law. It is true in that case the injured boy was a trespasser, but it is not seen that this fact at all weakens the effect of his contributory negligence, since it is not a question of right to be in a given locality which determines the matter at issue, but whether there are adequate intelligence and capacity to apprehend, discover, and guard against danger to be expected in that locality.

A bright boy of 12 years of age met his death at a railroad crossing in the city of New York, in the following circumstances: It appeared, from the evidence on behalf of plaintiff, that the deceased, having crossed the track, turned back to recross it, when the train was in plain view, distant about 400 feet, and he must have seen it had he looked; that either he caught his foot in or near the rails, or he stumbled and fell, was struck by the engine, and killed. Held, that such attempt to recross was negligence on his part, whether he could or could not have crossed in safety, had he not been delayed by catching his foot or stumbling; and that a motion to dismiss the complaint on the ground of his contributory negligence should have been granted. *McPhillips v. Railroad Co.*, 12 Daly, 365.

In *Wendell v. Railroad Co.*, 91 N. Y. 420, another crossing accident is reported, and, in discussing the case, RUGER, C. J., said: "At the time of the accident he was a bright, active boy, about seven years of age, considered competent by his parents to go to school

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and upon errands alone. He was sometimes intrusted with the duty of driving a horse and wagon, and was in the habit of crossing the railroad track at the place where the accident occurred. Previous to the accident he had been stopped while attempting to cross by the flagmen stationed at that point, and had been before cautioned by them against attempting to cross in front of an approaching train. The accident happened in broad daylight, and from the place where it occurred a train could be seen for upward of 500 feet south of the crossing. The street on which the boy was passing (Main street) marked the southern boundary of the settled part of the city. No buildings lined the railroad south of Main street, and, from the point where the boy started to cross the track, no object intercepts a view of an approaching train for a long distance. No conflict as to these facts appears in the evidence, and they are mainly proven by the statements of the plaintiff's witnesses. The case was tried upon the assumption by the court and both parties that the deceased was *sui juris*. At the time of the accident he was upon an errand for his mother which required him to cross this railroad track. The assumption that the boy was *sui juris* implies that he had sufficient mental and physical capacity to be chargeable with the exercise of some degree of care and prudence, and responsible for the consequences of some degree of negligence; but, doubtless, owing to his tender years, a lesser degree of care was required of him than of one of mature age. * * * Nevertheless, an infant, whatever his age, is not in law altogether exempted from the exercise of care and prudence in approaching a known danger. * * * In the light of these principles, let us examine the circumstances of this case. Shortly before the accident, the deceased, with a companion two years older, was standing near the flagmen's shanty on the south side of Main street and 51 feet east from where he was struck. The flagmen had left the shanty and approached the track in the performance of their duty. The approaching train was in plain sight from the place where the

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boys stood for a distance of about 500 feet from the crossing. They both suddenly started on a run on the south sidewalk of the street, the older boy some 15 feet in advance, to cross in front of the approaching train. The flagmen, who faced the boys, shouted to them to stop, and waved their flags as signals to them. The older boy passed the flagmen, and crossed in safety. Eckel, one of the flagmen, stood on the sidewalk, 10 or 15 feet from the track on which the train approached, and endeavored to intercept the deceased, but the latter eluded him by either dodging or running under his outstretched arms, and reached the track, when he slipped and fell. The flagman followed, and endeavored to rescue him; but the train was so near he failed in his attempt, and the boy was killed. * * * All of the bystanders were aware of the approaching train, and seemed to anticipate danger to the boys. * * * Under the circumstances, we think he was negligent, either in going upon the track without looking to see whether a train was coming or not, or, if he did look and see it, in doing so while it was in such dangerous proximity. The exercise of active vigilance, under such circumstances, was a duty which the law imposes upon every person who attempts to cross a railroad track. He should not be permitted to make close calculations to determine whether he can safely pass in front of an approaching body, and, when the experiment has failed, charge the consequences of his mistake upon the owner of the colliding vehicle or property. *Belton v. Baxter*, 54 N. Y. 246." And upon these facts the judgment was reversed, because of failure of the trial court to nonsuit the plaintiff.

In Michigan, a boy of 12 years, unusually bright for his age, was killed in a collision by climbing upon and riding on the front of an engine, out of sight of the employees; and, as the evidence of his negligence was clear and undisputed, it was held that the boy was not a trespasser, but that the lower court was correct in directing a verdict for the defendant railroad, *MORSE, J.*, remarking: "A boy of 12 years knows as well as

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an adult, that upon the top of freight cars, or in front of the engine, when reversed, between that and the cars, is not a safe place when the train is moving. The fact that a boy of that age is more reckless and not as cautious as a man, in the face of such danger, is not, of itself, enough to excuse him. I can see no reason for submitting a question as plain and clear as this one to a jury. There could be but one result if the judgment and oaths of the jurors were not warped and disregarded because of the natural sympathy that goes out instinctively towards the sufferer in such a case as this. The plaintiff's intestate was guilty of contributory negligence in riding as he did upon the train, and no fault of the company or its employees, short of gross or wanton carelessness, can excuse him from the results of such negligence." *Ecliff v. Railroad Co.*, 64 Mich. 196.

So, in Iowa, a boy between 11 and 12 years of age was struck by a passing train, and killed, while he, with other boys, was playing or lounging on the track. The train by which he was struck was running at about 25 miles per hour, while an ordinance of Des Moines forbade trains from running within the city limits at a speed greater than 6 miles an hour. ADAMS, C. J., after remarking that deceased was a trespasser, proceeds to say: "He was guilty of contributory negligence, unless he was a person of such tender years that he should be presumed to have such lack of discretion as to relieve his act of the character of negligence. The plaintiff contends that he was of such tender years; that he should have been so presumed, or, at least, that the jury would have been justified in so finding. But we think otherwise. A boy 11 years of age knows, as well as an adult does, what a railroad is, and the use to which it is put, and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play or lounge amid a network of tracks. It is true that a boy of that age cannot be presumed to have the judgment of an adult; but it does not require much judgment to keep from walking in a

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dangerous place, the dangers of which are fully understood. * * * We hold that, under the undisputed evidence, the deceased was guilty of contributory negligence, and that such negligence precludes the plaintiff from setting up any negligence of the defendant prior to the time the deceased was discovered by the defendant's employees." The verdict in that case was for the defendant, and it was ruled that such verdict should be allowed to stand, and that it was error to set it aside. *Masser v. Railroad Co.*, 68 Iowa, 602.

In North Carolina an infant of eight years of age, in disobedience of the commands of his mother and the warnings of defendant's agents and servants, and unobserved by the engineer, jumped upon a "shifting" engine, about to move, took a position where he could not be seen by those in charge and operating the engine, and remained there until, becoming alarmed at the speed, he attempted to jump off, and received severe injuries. It was held that he was not entitled to recover, though no whistle was blown or other signal given, and this on the ground of contributory negligence. *Murray v. Railroad*, 93 N. C. 92.

In Wisconsin, an infant 13 years of age fell through a hole in a bridge, and was drowned. His mother, it seems, sent him across the bridge on an errand. It appeared from the plaintiff's evidence that the deceased was 13 years old; that he was familiar with the bridge, and knew of the hole in it; and that the accident occurred in the daytime, and he had passed over the bridge a short time before on the same day. The defendant city having gained a verdict, on appeal the judgment was affirmed, on the ground that deceased was a person of sufficient discretion, knowing the danger, to have avoided it by the exercise of ordinary care, and that therefore his death was to be attributed to his want of proper care, to-wit, contributory negligence. *Achtemhagen v. City of Watertown*, 18 Wis. 331.

T. was a boy 12 years old, intelligent, accustomed to attend school and assist the family by his labor. He lived near defendant's road. He was killed by one of

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defendant's locomotives when attempting to cross its tracks. The day was windy, and it was snowing, but not enough to obstruct the view. The street upon which he was traveling was crossed by four of defendant's tracks. The first was a switch track, upon which cars were standing on each side of the street, a passageway having been left open for teams and individuals to pass along the street. T. stopped in the center of the switch track, facing the direction of the locomotive, which was backing down at a high rate of speed. If he had looked he could have seen 186 feet down the track. From the point where he stood to the centre of the track, where he was struck and killed, the distance was 14 feet. T., after changing a bag he was carrying, from one shoulder to another, started on. After taking one step, he had an unobstructed view, down the track on which the locomotive was coming, for two streets. He did not look in that direction after he started. Held, that T. was *sui juris*, and was guilty of contributory negligence, and that the submission of the question to the jury was error; and held, also, that in the absence of evidence tending to show that a boy 12 years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris*, and chargeable with the same measure of caution as an adult. And the judgment was reversed. *Tucker v. Railroad Co.*, 124 N. Y. 308.

In the light of these authorities and the reasons they suggest, it should be ruled that plaintiff was *sui juris*, and, being guilty, beyond doubt, of contributory negligence, is not entitled to recover in this action. And, in concluding this paragraph, it is well enough to remark that when this cause was here on a former occasion (129 Mo. 405), the facts now in evidence as to plaintiff's intelligence and capacity were not nearly so fully developed.

3. Though defendant may have been guilty of running its train at a greater rate of speed than allowed by ordinance, yet, as it is clear that plaintiff was indu-

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bitably guilty of contributory negligence, which was the immediate cause of his injury, the negligence of defendant cannot be invoked to aid plaintiff in a recovery. *Prewitt v. Eddy*, 115 Mo. 283.

4. But it may even be conceded that plaintiff was not negligent, so far as concerns being struck by defendant's train or engine, and still he should
Name—Admission. be denied a recovery, and for these reasons: In the evidence already related, there is none that plaintiff was struck by the engine. A number of witnesses testify that he was not thus struck, and he does not pretend that he was. He says the train ran over him; but this all may be literally true, and still it be also true that the engine or cow-catcher never struck him. How, then, did the train come to run over him? The answer is given in the testimony of several witnesses. Chinn, who, sitting on the porch of the Arcade Hotel, on the north side of the Russell street crossing, saw a boy coming from the south side of the crossing, and, when the train came along, he saw that boy under and on the south side of the train. He seemed to be snatching at something. He seemed to be reaching after it, like he was reaching for the steps, or some part of the train, the same as a person would do to catch the car with both hands. In the testimony of Bowman, who was only some six or seven feet from the train, and on the south side of it, as it passed the crossing, saw plaintiff going north on crossing, and, while on the south side of the train, make a grab at the train, at the banister or step of about the third car, and he held a little too tight, and it jerked him under. When the boy grabbed at the train, he was just close enough to it to reach out with his hand and touch the banister on the steps. In the testimony of Rutherford and Taylor, who went to plaintiff after the train had passed and left him lying on the south side of the main track, and, when they asked him what was the matter, and how he got hurt, he said to Rutherford that he was putting out his hand, or putting it on the train, and it ran over him. To Taylor he said he was holding out

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his hand to the train, and that it ran over him. In the testimony of Donblaser, who, standing in front of the Arcade Hotel, saw a negro boy, who looked to be 12 or 13 years old, approaching the crossing from the south side of the track, but just then the train came along, passed between him and the boy, and he saw him no more. Now, plaintiff does not attempt to deny the truth of the statements of these witnesses, and, therefore, their statements are to be taken as true—as much so as if plaintiff had made the admission in terms, as has been frequently ruled by this court in criminal cases. *State v. Musick*, 101 Mo. 271; *State v. Patrick*, 107 Mo., 174; *State v. Alexander*, 119 Mo., 461; *State v. Paxton*, 126 Mo. 514; *State v. Good*, 132 Mo. 125. And, obviously, if this rule obtains in criminal cases against a defendant witness, *a fortiori* should it obtain against a plaintiff witness in a civil case. For this reason we hold that it stands admitted on this record that plaintiff was not struck on the crossing by the train, but was hurt after he had crossed, by heedlessly attempting to catch hold of the train as it passed by, and was thus jerked under it and injured. In such circumstances, it only remains to say that, viewed in any light, the judgment should be reversed, and judgment entered in this court for defendant.

GANTT, MACFARLANE, and ROBINSON, JJ., concur. BURGESS, J., concurs in paragraph 4 only. BRACE, C. J., and BARCLAY, J., dissent.

Cleary v. Pittsburgh, A. & M. Traction Co.

CLEARY

v.

PITTSBURGH, A. & M. TRACTION CO.

(*Supreme Court of Pennsylvania, January 4, 1897.*)

Accident at Street Crossing—Negligence—Question for Jury.—A foot passenger was about to cross a street, and a car stopped just before reaching the crossing, each apparently expecting the other to wait, and they both started so nearly together that a collision became unavoidable. *Held*, that the question of negligence was for the jury.

APPEAL from Allegheny county court of common pleas. *Affirmed.*

A. M. Neeper, for appellant.

Marshall & Sproul and *Marron & McGirr*, for appellee.

MITCHELL, J. It is charitable to suppose that the plaintiff's recollection was so confused after the accident as to make her testimony worthless, for she testifies that she looked around in the direction of the bridge, and there was no car there, whereas the uniform and indisputable testimony of every one else who saw the accident, including her own witness, O'Hara, was that the car which struck her was within 15 to 20 feet of her at that moment. This would, therefore, be a clear case of contributory negligence by stepping in front of a moving car, within the rule in *Carroll v. Railroad Co.*, 12 Wkly. Notes Cas. 348, were it not for the fact that appears clearly, even in the defendant's evidence, that the car had also stopped. We have, therefore, the case of a foot passenger about to cross a street, a car stopped just before reaching the crossing, each apparently expecting the other to wait, and then both starting so nearly together that a collision became unavoidable.

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Under such circumstances, only a jury could say where the fault lay. The recital of the testimony by the judge in his charge did not follow the language of the witnesses exactly; indeed, it would have been very difficult to repeat much of it precisely; but we have not been convinced that he made any substantial misstatement of the substance of it. Judgment affirmed.

GREEN

v.

CHICAGO & W. M. R. Co.*

(*Supreme Court of Michigan, Nov. 17, 1896.*)

Lookout on Rear of Train—Negligence.—A child was run over and killed at a frequently-travelled private crossing by a train which was being slowly backed, and had no lookout at the rear. *Held*, that the question as to the negligence of the railway company in the management of its train was for the jury.

Negligence—Question for Jury.—A two-year-old child in its mother's charge wandered from a yard in which it was playing with other children into a highway, and then along a private way to a railroad, where it was killed by a train, being out of sight but a few minutes before the accident occurred. *Held*, that the question of the mother's negligence was for the jury.

ERROR to Muskegon county circuit court. Affirmed.

Smith, Nims, Hoyt & Erwin, for appellant.

Brown & Lovelace and *Jerome E. Turner*, for appellee.

HOOKER; J. The plaintiff's son, an infant about two years of age, wandered from the premises of its grandmother into the highway, and from there upon and along a private way to the defendant's railroad track, where it was killed by a train of flat or freight cars which was being backed slowly, in the process of switching. No eyewitness of

Lookout on Rear of
Train—Negligence.

*See notes at end of case.

Notes.

the accident was produced, but there was evidence tending to show that there was no lookout upon the cars as the train was backed up, the brakemen being otherwise engaged at the time. The court refused to direct a verdict for the defendant, and left the questions of plaintiff's negligence and contributory negligence to the jury, and a verdict was found for the plaintiff.

While it is true that the child was not killed upon a public highway, there was evidence that tended to show that the accident occurred upon, or in immediate proximity to, a private way, crossing the defendant's track, which was in daily and common use by the owners and such footmen from the adjoining village as chose to use the same, and that this was known to the defendant and its employees. In such usage, which had long continued, the defendant apparently acquiesced. To what extent this way was travelled, and consequently the degree of care required in the management of trains, were proper questions for the jury. *Schindler v. Railway Co.*, 87 Mich. 400; *Townley v. Railway Co.*, 53 Wis. 626; 4 Am. & Eng. R. Cas. 562; *Reifsnyder v. Railway Co. (Iowa)* 57 N. W. Rep. 692; *Clampit v. Railway Co. (Iowa)* 50 N. W. Rep. 673; *Cooper v. Railway Co.*, 66 Mich. 261.

The mother of the child was visiting at the grandmother's, and the child was with other children in the yard. The testimony indicates that they were out of sight but a few moments, before the accident occurred; and we cannot say that the mother was negligent, that being a proper question to be left to the jury. The judgment is affirmed. The other justices concurred.

Negligence—Question for Jury.

NOTES.

Lookout on Rear of Car.—See *Brunswick, etc., R. R. Co. v. Gibson*, 5 Am. & Eng. R. Cas., N. S., 441, 444.

A company is responsible for an injury to a child trespassing on its track, where the injury might have been prevented had the employees of the company used ordinary care in keeping an outlook. *Texas, etc., R. Co. v. O'Donnell*, 10 Am. & Eng. R. Cas. 712, 58 Tex. 27. *Distinguished* in *Williams v. Texas, etc., R. Co.*, 15 Am. & Eng. R. Cas. 403, 60 Tex. 205. *Reviewed* in *Galveston, etc., R. Co. v. Ryon*, 34 Am. & Eng. R. Cas. 30, 70 Tex. 56.

Phillips v. Detroit, G. H. & M. R. Co.

A boy seven years old, without the fault of his parents, wandered to a station, entered a passenger train, and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track at a place near a highway crossing, where he could be seen for three-fourths of a mile by persons in charge of a train coming from the south. A freight train moving northward, in the daytime, on an ascending grade, where it could easily have been stopped, had an effort been made to do so, ran upon and killed the child. *Held*, that the company is liable. Indianapolis, etc., R. Co. v. Pitzer, 25 Am. & Eng. R. Cas. 313, 109 Ind. 179. *Distinguishing* McClelland v. Louisville, etc., R. Co., 94 Ind. 276; Scheffler v. Minneapolis, etc., R. Co., 32 Minn. 518, 19 Am. & Eng. R. Cas. 173. *Limiting* Louisville, etc., R. Co. v. Sullivan, 81 Ky. 624. *Quoting* Atchison, etc., R. Co. v. Weber, 33 Kan. 543; Railway Co. v. Valleley, 32 Ohio St. 345.

The plaintiff, an infant of tender years, was run over and injured by a gravel train of the defendant, midway between Grand avenue and Theresa street in the city of St. Louis. The evidence was conflicting as to the length of time she was on the track before the injury, but the track was level, the view between the streets was unobstructed, the road was unfenced, and there were dwellings on either side; there was a pathway leading across the track, and the train was approaching the crossing, and, according to the testimony of some, a woman who saw the child ran and signaled to the trainmen in time for them to stop the train. *Held*, that if the servants of the defendants saw, or, by the exercise of ordinary care, under the circumstances stated, could have seen, the plaintiff in time to have avoided injuring her, and failed to do so, the defendant is liable; and whether the servants of the defendant were, about the time of the injury, using such care was a question of fact for the jury. Frick v. St. Louis, etc., R. Co., 8 Am. & Eng. R. Cas. 280, 75 Mo. 595. *Distinguished* in Rine v. Chicago, etc., R. Co., 88 Mo. 392. 25 Am. & Eng. R. Cas. 545. *Quoted in* Donahoe v. Wabash, etc., R. Co., 83 Mo. 543. *Reviewed in* Williams v. Kansas City, etc., R. Co., 37 Am. & Eng. R. Cas. 329, 96 Mo. 275.

PHILLIPS

v.

DETROIT, G. H. & M. R. Co.

(*Supreme Court of Michigan, Dec. 24, 1896.*)

Accident at Crossings—Contributory Negligence.*—A deaf person driving towards a railroad crossing on one side of which ties were piled so as to obstruct the view of road failed to stop and look along

**Note.*—See 34 Am. & Eng. R. Cas. 38; 3 Rap. & Mack's Digest, 592, 593.

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the track, which he could have seen by standing up in his carriage, but drove on the track, and was struck and injured by a train. Another person had passed over the track in safety a few minutes before. *Held*, that the plaintiff was guilty of such contributory negligence as to prevent a recovery for injuries.

ERROR to Ionia county circuit court. *Affirmed*.

Vernon H. Smith and Clute & Clute, for appellant.
L. C. Stanley (E. W. Meddaugh and Geer & Williams, of counsel), for appellee.

LONG, C. J. This action is brought to recover damages for an injury to the plaintiff by a passenger train at a highway crossing on the defendant's road. On Sunday, June 4, 1893, a washout had occurred on the Chicago & Grand Trunk Railroad, between Lansing and Durand, so that the through passenger train from Chicago eastward was taken from Lansing to Ionia, thence eastward to Durand, over the defendant's road, passing through the village of Muir, where the accident happened. The train passed the station at Muir, without stopping, a little past noon, running at a rapid rate of speed, the witnesses varying in testimony in regard to it; some stating the rate as high as 45 miles an hour, and others about 20 miles. It was an irregular excursion train. Three blocks east of the depot, and about 1,170 feet distant, the train passed over Plain street at grade. The plaintiff, a man about 67 years of age, quite deaf, lived at Portland, about seven miles from Muir, and on that morning, traveling from his home to Carson City, passed through the village of Muir. He entered the town from the south side on Prairie street, and turned eastward into Superior street, which is parallel with the track of defendant's road, and about 200 feet distant from it. He traveled along Superior street about 1,170 feet, when he turned northward into Plain street. No train was in sight when he turned into Plain street. He was riding in a single carriage, with the top up, and side curtains off, drawn by one horse, which was gentle and steady. Driving northward along Plain street, his view was for the most part obstructed, first by a dwelling house, then by some

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bushes, a hen house, and a pile of ties, the ties extending up to within 6 or 8 feet of the railroad track. The hen house was about 6 feet high, and the ties, at the utmost, were only 9 feet high. The plaintiff did not stop his horse, but drove along to a point past the pile of ties, when, looking westward, he saw the train approaching, and about 70 feet distant from him. His horse was then upon the track. He drove across, and the train caught the carriage, overturning it, and injuring the plaintiff severely, as well as damaging his horse and carriage. The negligence charged is: (1) That the defendant, by allowing the ties to remain there, and obstruct his view, led him into a place of danger; (2) that it failed to provide a watchman; (3) that the train was running at an unlawful rate of speed, and without sounding the bell or whistle; (4) that the defendant had no right or authority to run the train on Sunday. At the close of the case, the court below directed verdict and judgment in favor of the defendant. Plaintiff brings error.

From the record it is apparent that the plaintiff took none of the precautions which the law requires of one who is about to cross a railroad track. Some claim is made that Stoddard, who was in advance of the plaintiff, passed over the track in safety, and that the plaintiff had the right to rely upon that fact, and was thereby not required to take the same precaution which he otherwise would; but it appears that Stoddard was greatly in advance of plaintiff, and had turned the corner of Plain street, a distance of nearly 175 feet, before the plaintiff reached the crossing; and it does not appear that the plaintiff in any manner relied upon the fact that Stoddard had passed safely over. *Jensen v. Railroad Co.*, 102 Mich. 176; *Houghton v. Railway Co.*, 99 Mich. 308. The plaintiff, if he could not see an approaching train by reason of these obstructions, was bound to use greater precautions in nearing the track. A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and, if

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either sense cannot be rendered available, the obligation to use the other is stronger, to ascertain, before attempting to cross, whether a train is in dangerous proximity ; and if he neglect to do this, but ventures blindly upon the track, without any effort to ascertain whether a train is approaching, it must be at his own risk. This is the general rule settled in this state, but modified by the proposition that he is not bound to the same degree of care where he has no reason to expect a train to pass at that time. *Railroad Co. v. Miller*, 25 Mich. 274 ; *Guggenheim v. Railway Co.*, 66 Mich. 150, 32 Am. & Eng. R. Cas. 89. But the law requires a person to exercise a great degree of care in making these crossings. The track itself is a warning of danger ; and, if one goes upon it heedlessly, he assumes the risk incident thereto. Here the plaintiff was quite deaf. It is apparent that he could not hear the noise of the train. He knew the track was there ; was familiar with the road. He could not see because of these obstructions, and yet he did not stop or take any other precaution to ascertain if a train was approaching. He had no right to rely upon the fact that it was Sunday, and that no train was likely to approach, and drive blindly on. He must exercise some care. We are unable to find that he exercised any, even the slightest, care. If he had stood up in his carriage, and looked westward, he could have seen over the hen house and the pile of ties, and have seen the train while it was some 1,200 feet away. He did not stop, and, if he had, he was, it appears, too deaf to hear the rumbling of the train. The case, it seems to us, is one where the plaintiff was so manifestly guilty of contributing to his own injury that a recovery should not be permitted. In *Shufelt v. Railroad Co.*, 96 Mich. 327, it appeared that, if Mrs. Shufelt had stopped 18 or 20 feet from the crossing, she could have seen the train. MR. JUSTICE HOOKER in that case, speaking for a majority of the court, said : " It was her duty to look both ways after getting where she could see before venturing upon the track, and she should have taken sufficient time to do

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so, though it became necessary to stop her team for the purpose. * * * A person is not justified in driving upon a track in the face of an approaching train without looking for it, and obstructions to the view in proximity to the track increase the obligation of extreme caution." The present case, upon its facts, shows more clearly the obligation resting upon the plaintiff, for not only was his view obstructed, but he was very deaf. Whatever view may be taken of the testimony, and placing upon it all the latitude claimed by counsel for plaintiff, it is difficult to find in it any proof of care or caution taken by plaintiff, as he ran blindly into danger.

The contention of counsel that this was a Sunday excursion train, and unlawfully run, we think, can have a bearing only upon the question as to whether the plaintiff would not be required to exercise the same care in making the crossing. If he was not expecting a train, or had a right to assume that no train ever ran on Sunday over that road, and he was relying upon that fact, it might, in a sense, excuse him from that degree of care that otherwise he was bound to exercise. But it is apparent from the record that, had the plaintiff had that in view, he did not take the precautions which the law requires, for even under such circumstances he had no right to go blindly upon the track. But, though it is the exception on that road to run Sunday trains, yet excursion trains frequently go over the road on Sunday. The judgment must be affirmed. The other justices concurred.

Pittsburgh, &c., R. Co. v. Crown Point.

PITTSBURGH, C. C. & ST. L. R. CO.

v.

TOWN OF CROWN POINT.

(Supreme Court of Indiana, Dec. 16, 1896.)

Ordinance Compelling Railway Company to Keep Watchman and Gates—Validity.—*A state statute gave the board of trustees of an incorporated town the exclusive control over the streets, alleys and highways and bridges within the corporate limits of such town, and authorizing them to declare what shall constitute a nuisance, and to prevent, abate, and remove the same; to regulate or prohibit the use of things tending to endanger persons or property; to prevent interference with the free use of the streets and alleys of the town; to establish such ordinances, not repugnant to the laws of the state, as may be necessary to carry into effect the laws of such powers. *Held*, that such statute did not authorize an ordinance to compel a railroad company to keep at its own expense a watchman, and erect and maintain a gate on each side of its track, at each street crossing within the town limits.

APPEAL from Lake county circuit court. *Reversed.**N. O. Ross and J. R. Peterson*, for appellant.*Willis C. McMahan*, for appellee.

MONKS, J. The question involved in this appeal is as to the power of incorporated towns to compel by ordinance a railroad company to keep a watchman and erect and maintain gates at points where the tracks cross a street, and impose penalties for the failure so to do. It is the law in this jurisdiction that municipal corporations possess and can exercise such powers only as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. No incidental powers can be implied, except such as are essential to the accomplishment of the purposes of their

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Power of Municipal Corporations.

*Note.—See 23 Am. & Eng. Ency. of Law 998.

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creation, and for their continued existence. *City of Shelbyville v. Cleveland, C., C. & St. L. R. Co.* (Ind.) 44 N. E. Rep. 929, and authorities cited; *Champer v. City of Greencastle*, 138 Ind. 339, and cases cited; 1 Dill. Mun. Corp. §§ 89, 90. Doubtful claims to power, or any doubt or ambiguity in the terms used by the legislature, are resolved against the corporation. *Minturn v. Larue*, 23 How. 435; *Bloom v. Xenia*, 32 Ohio St. 465; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118; 36 Am. & Eng. R. Cas. 27; *Cooley*, Const. Lim. 233, 234; 1 Dill. Mun. Corp. §§ 89-91; *Tied. Mun. Corp.* § 110. It is also settled law that where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified nature and character, and with precision defines the details of the same, and prescribes the penalties that may be imposed, if the power thus granted be not in conflict with the constitution, an ordinance within the powers granted, prescribing penalties within the designated limit, cannot be set aside by the courts because they may deem it unreasonable, or against public policy. But where the power to legislate upon a given subject is granted, and the mode of its exercise and the details of such legislation are not prescribed, then the ordinance passed pursuant thereto must be a reasonable exercise of the power, or it will be pronounced invalid. In other words, an ordinance expressly authorized by specific and definite legislative authority will be upheld, unless it conflicts with the constitution; while an ordinance which the municipality seeks to uphold by virtue of its incidental powers or under a general grant of authority, will be declared invalid, unless it be reasonable, fair, and impartial, and not arbitrary or oppressive. *City of Shelbyville v. Cleveland, C., C. & St. L. R. Co.*, *supra*, and authorities cited; *Haynes v. City of Cape May*, 50 N. J. L. 55; *Hawes v. City of Chicago*, 158 Ill. 653; *City of Chicago v. Rumpff*, 45 Ill. 90; *Ex parte Chin Yan*, 60 Cal. 78; *Davis v. Town of Anita*, 73 Iowa 325; *Burg v. Railway Co.*, 90 Iowa 106; *Meyers v. Railway Co.*, 57 Iowa 555; *Phillips v. City*

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of Denver, 19 Colo. 179; City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16); Evison v. Railway Co., 45 Minn. 370; 1 Dill. Mun. Corp. 319, 330; Tied. Mun. Corp. § 110; Robinson v. Mayor, etc., 1 Humph. (Tenn.) 156, 34 Am. Dec., note, 627, 643. It is contended by appellee that section 4404 and clauses 4, 6, 9, and 16 of section 4357, Rev. St. 1894 (sections 3367, 3333, Rev. St. 1881; sections 3367, 3333, Horner's Rev. St. 1896), grant the power in question. By section 4404 (3367) the board of trustees of an incorporated town is given the "exclusive control over the streets, alleys, and highways and bridges within the corporate limits of such town." Said clauses of section 4357 (3333), *supra*, are as follows:

"Fourth. To declare what shall constitute a nuisance, and to prevent, abate, and remove the same; and to take such other measures for the preservation of the public health as they shall deem necessary."

"Sixth. * * * To regulate or prohibit the use of fire arms, fireworks, or other things tending to endanger persons or property; to prevent interference with the free use of the streets and alleys of the town, and to preserve peace and good order and prevent vice and immorality."

"Ninth. To lay out, open, grade, and otherwise improve the streets, alleys, sewers, sidewalks, and crossings, and keep them in repair and vacate the same."

"Sixteenth. To make and establish such by-laws, ordinances, and regulations not repugnant to the laws of this state as may be necessary to carry into effect the provisions of this act."

The question before us, and which we are called upon to decide, is not whether the legislature, in the exercise of its broad police power, should compel railroads to keep watchmen and erect and maintain gates at their own expense at street crossings, nor is it whether the legislature should grant such power to incorporated towns, but it is whether the legislature has granted such powers to incorporated towns. It is clear

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said sections 4357 (3333) and 4404 (3367), *supra*, do not, in express words, grant the power to pass the ordinance in question. Can such power be fairly implied from those expressly granted, or is such power essential to the declared objects or purpose of the corporation? We think not. It may be admitted that incorporated towns have the power to regulate public travel upon the streets so as to make their use reasonably safe at all times for those who go upon them, and to enact ordinances for the protection of health, life, and property. It is true that the persons and property of those who attempt to cross a railroad track are subject to risk. The question, however, is not whether the incorporated town has a right to protect its inhabitants or their property, but whether it has the right to compel the railroad company to do so at its own expense. The propositions are essentially different. It is not enough to show that incorporated towns have been given the power to regulate travel upon the streets, and to protect life and property. It may be that under the provisions of the statute above set forth, incorporated towns have the power to keep watchmen and erect and maintain gates at points where a railroad crosses the streets of the town; but this, if true, would not uphold the ordinance in question. Under such a power, if it exists, the watchman must be employed, and the gates erected and maintained at the expense of the town. To sustain the ordinance, it must be shown that they have been empowered to compel railroad companies, at their own expense, to employ a watchman, and erect and maintain gates, at each street crossing,—the agency here invoked to accomplish the object. If the employment of the watchman and erection and maintenance of the gates by the incorporated town would as well accomplish the object, it cannot be said that the power to compel the railroad company to do so is implied from the authority to regulate public travel upon the streets and protect life and property. A railroad company, in crossing the streets, is on an equality with the citizen. Their rights are mutual. The streets are for public

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use, and the company has the right to propel its locomotives and cars across them, and is not a wrongdoer in so doing. It is liable in damages to any one who, without fault on his part, is injured by the negligence of the railroad company at such crossings. It is clear, therefore, that a railroad company is not guilty of any crime or wrongful act in running cars on its tracks across a street. Neither would such an ordinance prevent interference with the free use of the streets and alleys of the town. On the contrary, the use of the streets would not be as free, perhaps, with gates and watchmen as without them. The provision of clause 6, granting the power "to regulate or prohibit the use of firearms or other things tending to endanger persons or property," gives no aid to appellee's contention. If it were admitted that this provision applied to railroads, it would only authorize an ordinance as to the manner in which railroads should manage their trains and property within the limits of the corporation. There is a wide difference between the power to compel the employment of watchmen, and the erection and maintenance of gates, and the power to regulate the speed of cars within the corporate limits of a town. The object in the latter case is to be attained by the management and use by the company of its machinery, and such regulation relates to how the company shall manage its own property within the corporate limits; while the requirement of gates and watchmen relates to how the company shall compel or induce others upon the streets to regulate themselves and their property when approaching and about to cross its tracks. Sections 4357 (3333) and 4404 (3367), *supra*, may authorize an ordinance, not unreasonable in its terms, to prevent the standing of cars and other obstructions on railroad tracks at street crossings, so as to obstruct the same, or an ordinance regulating the speed of railroad trains within the corporate limits of a town, but most certainly not an ordinance to compel the railroad company to keep at its own expense a watchman, and erect and maintain a gate on each side of the track, at each street

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crossing. Incorporated cities exercise this power, but not by virtue of the control given them by the legislature over the streets and alleys, nor their power to lay out, open, and improve streets and alleys, but under clause 42, § 3541, Rev. St. 1894 (section 3106, Rev. St. 1881; section 3106, Horner's Rev. St. 1896). *Kistner v. City of Indianapolis*, 100 Ind. 210. It follows that the court erred in overruling the demurrer to the complaint. Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not in conflict with this opinion.

CAPE MAY, D. B. & S. P. R. CO.

v.

CITY OF CAPE MAY *et al.**

Power of City to Control Street Railways.—A city, having authority under its charter to regulate the use of the public streets and highways, can enact an ordinance to compel passenger cars operated by trolley or electric power to come to a full stop before crossing intersecting streets; and such an ordinance, if enacted in the manner prescribed by the charter of the city, is legislative in its character, and will not be set aside as unreasonable in its purpose or effect.

(Syllabus by the Court.)

Ordinance affirmed.

Argued November term, 1896, before GARRISON and LIPPINCOTT, JJ.

E. A. Armstrong, for prosecutor.

D. J. Pancoast, for defendants.

LIPPINCOTT, J. This writ was sued out to test the validity of an ordinance of the city of Cape May entitled "An ordinance regulating the operation of passenger cars, operated by trolley or electric power at streets and other crossings in the city of Cape May." This

*Note.—See 23 Am. & Eng. Ency. of Law 998.

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ordinance was adopted July 9, 1895. It provides in its first section, as follows: "Be it ordained and enacted by the inhabitants of the city of Cape May in city council assembled, and it is hereby enacted by the authority of the same: That all passenger cars operated by trolley or electric power shall come to a full stop at each and every street before crossing the same, and also at each and every opening for foot passengers through the board walk on Beach avenue opposite to any street running down to Beach avenue before passing the same; also before crossing the Beach walk and Beach drive at any place." The second section provides a penalty for violations of the ordinance, and the third section ordains that it shall take effect immediately. The charter of the city of Cape May authorizes the city council to pass ordinances to regulate the streets of the city, and to provide for the manner in which corporations and persons shall exercise any privilege granted to them in the use of the same, to prevent immoderate driving or riding in the streets, and to regulate the running of locomotive engines and railroad cars therein, and also such ordinances as they may deem necessary and proper for the good government, order, and the protection of property and persons. P. L. 1875, p. 206, §§ 19, 20. The council of the city of Cape May has heretofore, by ordinance, granted this company the use of the streets for its electric cars (Cape May, D. B. & S. P. R. Co. v. City of Cape May [N. J.] 34 Atl. Rep. 397), and it was, at the time of the adoption of the ordinance under review, in full operation as an electric street railway. It is conceded that the crossings upon which this ordinance is intended to have effect are the crossings of public streets and public places devoted to all the uses of public travel in the city. An examination of the returns to the writ clearly reveals that the ordinance was passed by the city council according to the manner and procedure prescribed by the provisions of the city charter; and, while there are several reasons directed against the validity of the ordinance on this ground, they merit no consideration.

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The other reasons for reversal are that the ordinance is not legislative in its character, and passed without notice to the prosecutor, and that it is not within the powers delegated to the city council, and also is unreasonable. It will be noticed that the city council is clothed with power to regulate the streets by ordinance, and also to provide by ordinance the manner in which corporations or persons shall exercise any privilege granted them in the use of the same, to prevent immoderate driving or riding therein, to regulate the running of locomotives and railroad cars therein, and by ordinance, so far as may be necessary, provide for the good government, order, and the protection of property and persons. P. L. 1875, p. 206, §§ 19, 20. The power, therefore, is undoubted to make reasonable regulations to reasonably control the operation of electric street-railway cars, within the city, in many respects. *Trenton Horse R. Co. v. Inhabitants of City of Trenton*, 53 N. J. L. 132. The power to reasonably regulate the operation of these street railways is implied from the authority conferred upon the city council by the city charter. The franchise or privilege is granted by the municipality, and a reasonable regulation of the enjoyment of the franchise is not a denial of the right; for corporations, which are to be regarded as inhabitants of a city, are subject to its ordinances to the same extent as natural persons. The power is a police power, and one which is constantly exercised in prescribing regulations for the good of the community, and such regulations can be enacted by the legislative body of the municipality without notice to the parties who may claim to be interested, provided the regulations are made according to, and in the manner prescribed by, the charter of such municipality. The exercise of this power is legislative in its character. *Id.*; *Consolidated Tract. Co. v. City of Elizabeth* (N. J.) 34 Atl. Rep. 146; *Frankford & P. Pass. R. Co. v. City of Philadelphia*, 58 Pa. St. 119; *North Hudson R. Co. v. Mayor, etc., of City of Hoboken*, 41 N. J. L. 71; *Booth, St. Ry. Law*, § 222. Ordinances passed

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by virtue of an implied power conferred upon municipal corporations must be reasonably consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state. 1 Dill. Mun. Corp. (4th Ed.) § 319. There is such discretion left to the municipal corporations in the exercise of their general and implied powers, and the exercise of this authority will not be judicially interfered with unless its exercise has been manifestly unreasonable and oppressive, and is an invasion of private rights. No private right is invaded by the ordinance in question, and the presumption is in favor of its validity. The unreasonableness of the ordinance is not apparent on its face, and the burden of proof is on the prosecutor to show wherein it is arbitrary, unjust, or oppressive. Booth, St. Ry. Law, § 224, and cases cited in notes. Regulations may be made requiring street-railway cars to stop at designated places in order to accommodate passengers and prevent unnecessary obstructions to public travel, as well as to avoid danger of accidents to others in the ordinary use of the streets and other public places. Railroad Co. *v.* Calderwood, 89 Ala. 247, 44 Am. & Eng. R. Cas. 423. Street railways are a great public convenience, and they are to be properly protected in the exercise of their franchise; but they are not entitled to a monopoly of the street, nor even to the exclusive use of that part covered by their tracks. They must exercise their rights in harmony with the rights of the traveling public. The ordinance in question is presumed to be a valid ordinance. It does not appear on its face to be unreasonable or oppressive under the circumstances of the case. Neither does it otherwise appear in purpose or effect to be unreasonable. Electric street railways can be propelled at a very rapid rate of speed along the streets and over the crossings and intersections thereof, and other public places, with great danger to those using such crossings. In view of these dangers, incident to the operation of this class of street railways, it is incumbent upon the companies owning and operating

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them to exercise a degree of care and caution to avoid accidents commensurate with the risks involved. This degree of care is a reasonable one in view of the probabilities of danger, and the exercise of this care for the protection of the general traveling public can be enforced by ordinance. A regulation that the cars shall stop at every street before crossing is a reasonable one, which does not interfere with the franchise of the prosecutor, and would appear to be necessary to protect the public from the dangers incident to the crossing. The proceedings of the city council and the ordinance must be affirmed, with costs.

PITTSBURGH, C. C. & ST. L. R. CO.

v.

LEWIS.

(*Court of Appeals of Kentucky, Dec. 16, 1896.*)

Accident at Crossing—Failure to Stop, Look, and Listen—Negligence—Question for Jury.—A person about to cross a railroad crossing failed to stop, look, and listen, relying on hearing the signal bell which it was the duty of the railroad company to ring on approaching the crossing, and which it was in the custom of ringing. *Held*, that he was not as a matter of law guilty of such contributory negligence as to prevent a recovery for his injuries, but that the question of his negligence was for the jury.

Contributory Negligence.—Where one guilty of contributory negligence in crossing a railroad crossing without observing the proper precaution was struck and injured by an engine, such contributory negligence will not prevent him from recovering for his injuries if, after he was in peril, those in charge of the engine could have seen his danger, and have prevented his injury by the exercise of ordinary care.

Remarks of Counsel—Reversal.—The counsel for the plaintiff stated in opening the case that the place where the accident occurred was a dangerous one; that others had been injured there; and that, after the accident, watchmen had been placed there. The court told the jury to disregard these statements. *Held*, that such statements were not ground for reversal, the court having properly instructed the jury to disregard them.

Witnesses—Refreshing Memory.—In an action against a rail.

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road company to recover damages, the counsel for the defendant questioned a witness four times in order to elicit a fact which the witness had testified to in a statement made verbally by the witness, and afterwards reduced to writing by an officer of the defendant, and signed by the witness, but the witness did not testify to such fact. The counsel called his attention to the fact that he had signed such statement, and notified him what it contained, and still he did not recall the evidence that he had given in such statement. *Held*, that it was not error for the court to refuse to allow the witness to examine the statement in order to refresh his memory.

APPEAL from Jefferson county circuit court.
Affirmed.

Charles H. Gibson, for appellant.

O'Neal & Pryor, Alfred Selligman, and Phelps & Thum, for appellee.

HAZELRIGG, J. While walking southwardly and obliquely over the tracks of the appellant, and when on a public crossing, the appellee, a negro man, some 37 years of age, was struck by a locomotive coming from his right and at his rear, and his leg so injured as to require amputation. For this injury he brought this action for damages, and recovered judgment for \$5,920. Contrary to the general rule at this crossing, the proof conduces to show that no signal bell was ringing, and the car was moving with but little noise. It had been on the track on Fourteenth street, but, at a point something over 100 feet from the accident, had been switched off towards Maple street, and over this crossing, by a lever operated at the tower house some 200 feet away. By stopping or listening or looking to his rear, the appellee would have observed the train, and so escaped injury. He claims, however, that the usual train out had already passed, and, hearing no bell ringing he was not apprised of its approach until too late to escape. If appellee, when hurt, was in fact relying on the signal bell which it was the duty of the appellant to ring upon approaching the crossing, and which it was its custom to ring, and for this reason gave no heed to what was going on behind him, we cannot say, as a matter of law, that he was

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Accident at Crossing—Failure to Stop, Look, and Listen.

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guilty of such contributory negligence as would prevent his recovery. This is a question of fact for the jury, under the proof and all the circumstances attending the injury. In such cases we ought not to take the question of negligence or contributory negligence from the jury, when different findings might reasonably or even possibly be made by men of average intelligence. See *Passamanek v. Louisville R. Co.* (Ky.) 32 S. W. Rep., 620; *Sherm. & R. Neg.* § 114; *Beach, Contrib. Neg.* § 163. This court has not adopted the rule that the people of a crowded city are to stop, look, and listen before passing over a railroad at a public crossing. On the contrary, we have said that to prescribe such a rule would be unreasonable. *Ramsey v. Railroad*, 89 Ky. 103; *Wright v. Railroad Co.*, 94 Ky. 114. It follows that appellant's motion for a peremptory instruction was properly overruled.

Serious complaint is urged against an instruction which, while it denied to plaintiff the right to recover if his own negligence so contributed to the injury as that but for it the injury would not have been inflicted, yet added the qualification: "Unless the jury further believed from the evidence that, after the plaintiff was in peril from the injury, those in charge of it could have seen his danger, and have prevented his injury, by the exercise of ordinary care." We think the qualification embraces the well-settled law in such cases. Here was a public crossing—a sidewalk, in fact—in a large city; and it was the duty of those in charge of the train to keep a constant lookout for those on or about the crossing. After the appellee was in peril from the engine, "it was surely the duty to see him, and the appellant is not exonerated if they did not actually see him. *Railroad Co. v. Krey* (Ky.) 29 S. W. 869; *Railroad Co. v. Hackman* (Ky.) 30 S. W. 407.

Contributory Neg-
ligence.

In the opening statement of counsel for appellee, it was said that the place where the accident occurred was a dangerous one; that others had been injured there; and that, after the accident, watchmen had been placed there, etc. Upon

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objections to these statements being made, the court told the jury to disregard them; and this, it seems to us, is all the court should have done. If the jury is to be discharged from the case upon every improper remark of counsel, few trials could be finished. Ordinarily, the good sense and sound discretion of the jury can be relied on to prevent injustice by reason of incompetent statements of counsel, especially where the court directs that such statements are to be disregarded. *Railroad Co. v. Coyne* (Ky.) 30 S. W. Rep. 970; *State v. Rivers*, 90 N. Car. 738.

It is also urged that appellant's witness Montgomery ought to have been permitted to examine a paper signed by him a few days after the accident, in order to refresh his memory; his testimony on the stand being to the effect that he did not hear the switch tender Mulloy call out to the appellee "to look out" at the time of the accident, when the avowal is that, by showing the witness the paper, he would have remembered that he did hear Mulloy so call out. It developed that the witness did not write the statement or have it written, but the paper was made out from verbal statements made by him to some of the officials of the appellant, a few days after the transaction, and it is then made to appear that the witness did hear Mulloy so call out to the appellee. This witness testified to a number of facts favorable to the appellant, without hesitation or confusion, and gave no evidence of lack of recollection as to any fact connected with the transaction. He answered, at least, three times most positively that he heard no one call out to the appellee. Counsel for appellant then said to the witness that, for the purpose of refreshing his recollection, he would ask him if he did not sign a written statement of what he saw on the day of the accident. The witness answered that he did, a few days after the trouble. Counsel then said: "I am going to show you that statement, and ask you to read it; and, with your recollection refreshed, I am going to ask you the question whether or not you heard any body halloo,

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ing Memory.

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'Look out!'" The court sustained an objection to the question, but counsel again (the fourth time) asked witness if his recollection was that he heard such a call, and he answered, "No; I don't think I did." So it appears that even after the attention of the witness had been called to the fact that he had signed a written statement, and had been notified by counsel what it contained, he still did not remember on oath what the writing had made him say while not on oath. We think the process of refreshing the recollection of the witness was fairly tried by the course of the examination, and the witness given every opportunity to remember the alleged fact in dispute. Moreover, the call of Mulloy, if made, would serve rather to confuse the appellee than to apprise him of his danger. Judgment affirmed.

ILLINOIS CENT. R. CO.

v.

MIZELL.

(*Court of Appeals of Kentucky, Dec. 5, 1896.*)

Accident at Crossing—Negligence—Proximate Cause.—If by reason of the negligence of a railroad company in failing to give the statutory signals at a crossing the plaintiff went upon the track, and her horse was frightened, and injured her, the jury is entitled to find that such negligence was the proximate cause of her injuries.

Contributory Negligence—Question for Jury.—The fact that one approaching a railroad crossing failed to come to a full stop to listen for the train was not contributory negligence *per se*.

Negligence—Corroborative Testimony—Question for Jury.—Where in such case there was evidence of other witnesses who corroborated the statement of the plaintiff that such signal was not given, the question of the defendant's negligence was properly for the jury.

APPEAL from Hickman county circuit court. *Affirmed.*

George L. Husbands, for appellant.

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J. M. Brummal & Son and *W. G. Bullitt*, for appellee.

DU RELLE, J. The appellee was riding on horse-back along a public highway which crossed the railroad of appellant. At the intersection the railroad, and the highway as well, passed through cuts which prevented persons on the highway from seeing approaching trains until they were within a few feet of the rails. According to her statements, she was riding very slowly, and was listening for the signal, by bell or whistle, of the approach of a train. She heard no signal, and did not see the train until she was on the track at the crossing, and the train, which was a freight train, and going at a rapid rate, was, according to her statements, within 15 or 20 feet from her when she saw it. Her horse became frightened at the train, ran with her some 100 yards or more, and in turning a curve in the road threw her, and dragged her a short distance. She was badly bruised by the fall, and her shoulder was injured to such an extent that, at the time of the trial, it was an inch and a half lower than the other shoulder. By reason of the injury and her subsequent confinement to her room, she was unable to secure a position as teacher for which she was at the time an applicant. For the injuries received, and the suffering and loss of time caused thereby, she brought suit against the appellant, and the jury awarded her \$2,000.

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ing—Negligence—
Proximate Cause.

The basis of her complaint is that the alleged failure to give the signal required by law for the crossing was the cause of her attempting to make the crossing, and of her horse being frightened, and the consequent injuries. It is not pleaded that the failure to give the signal was in violation of law, and we do not think it was necessary to so plead it. The statute is a general one, and is not required to be specially pleaded. The principal ground relied on by appellant is that the alleged negligence in failing to blow the whistle was not the proximate cause of the injury; but if, by reason of that failure, the appellee went upon the track, and her horse

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was there frightened by the approaching train, the jury, if they believed appellee's witnesses, had evidence from which they were entitled to find that the negligence was the proximate cause of the injury, and that the damage followed as a continuous and natural sequence from the negligent act, and was a result which might have been foreseen and expected as the result of the conduct complained of, for it was to be expected that passengers on horseback might be traveling along the highway. Pars. Cont. 3, 179. The question of contributory negligence was properly submitted to the jury by the instructions. In our judgment, the fact that appellee did not come to a full stop to listen for the train, but brought her horse to a slow walk in order to listen, was not *per se* contributory negligence. There was evidence of other witnesses who corroborated her statement that the signal was not given, and the question was properly left to the jury. Instruction B, the refusal of which is complained of by appellant, does not appear in the record. The instructions given appear to correctly state the law. We cannot say, under the evidence in this record, that the verdict is excessive. Judgment affirmed.

Contributory Negligence—Question for Jury.

Negligence—Corroborative Testimony—Question for Jury.

COOKSON

v.

PITTSBURGH & W. R. Co.

(*Supreme Court of Pennsylvania, Jan. 4, 1897.*)

Accident at Crossing—Negligence.—A train ran past a crossing after detaching three cars on a siding by a flying switch, and then backed over the crossing again, with no brakeman at the rear, and no warning except the ringing of the bell at the other end of the train, and struck and killed a person driving over the crossing. *Held*, that the railway company was negligent.

Same—Description of Crossing—Opinion of Witnesses—Admissibility.—In an action to recover damages for the killing of a person

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at a railway crossing, the deceased stopped to look and listen on a hill at some distance from the crossing from which point the view of the track became more and more obstructed the nearer it was approached, with the exception of one place, which was so near the track as to be dangerous in case the horse became frightened. *Held*, that as the relative advantages and disadvantages of the two places could only be described in a general way, it was admissible for witnesses who were familiar with both to supplement their descriptions with their opinions to aid the jury in reaching a decision.

Accident at Crossing—Negligence Per Se.—Where there were but two places where a stop could be made in order to see the track before crossing a railway crossing, and the deceased chose the one which the public ordinarily used, the fact that it was the one remoter from the crossing did not render her guilty of negligence *per se*.

Negligence—Question for Jury.—Whether it was negligence in the deceased not to stop at the second place after having stopped at the remoter one is a question for the jury.

APPEAL from Butler county court of common pleas.
Affirmed.

R. P. Scott, for appellant.

Lev. McQuiston and *J. C. Vanderlin*, for appellee.

MITCHELL, J. The appellant's train was run northward, and, after detaching three cars onto a siding by a flying switch, was continued over and beyond the public road, and then backed over the crossing again, with no brakeman at the rear, and no warning except the ringing of the bell at the other end, even this being disputed. Under such circumstances the appellant's negligence, though not formally conceded, did not admit of serious contention.

The public road had a downgrade towards the track, and plaintiff's decedent stopped at a point about 175 feet from the crossing. Here she waited some minutes, until the three cars were switched off, and the train had proceeded north over the crossing. She then drove on, and was struck by the train as it reached the crossing the second time, running backward. The first three assignments of error are to the admission of the opinions of witnesses that the place where the deceased stopped to look and listen was the best, or at least a proper place. The subject of the admissibility of a witness' opinion was considered in *Graham v. Pennsylvania Co.*

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Accident at Crossing—Negligence.

Name—Description of Crossing—Opinion of Witnesses.

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139 Pa. St. 149, and the rule there settled that where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. But, whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men without special knowledge or training, opinions of witnesses, expert or other, are not admissible. This rule was followed in *McNerney v. Reading City*, 150 Pa. St. 611, and *Dooner v. Canal Co.*, 164 Pa. St. 17. As already said, the distance at which the deceased stopped was considerable, but evidence was given on the part of plaintiff that this point was on the rise of the hill, and that the view was obstructed more and more, in descending to the track, by a stone wall on the right, and by buildings on the left, and particularly, on this occasion, by one of the cars just switched off by this train, which stopped before it got entirely across the road. There was another place where, perhaps, a better view of the tracks could be had; but it was so close as to be dangerous in case the horses should become frightened. As the relative advantages and disadvantages of the two places could only be described in a general way, it was a fair case for the witnesses who were familiar with both to supplement their descriptions with their opinions in aid of the jury in reaching a decision.

The main argument of appellant, however, is that the evidence shows incontrovertibly that the deceased was negligent in not stopping at the second point already referred to, a level space just before reaching the track, and therefore the verdict should have been directed for the defendant. The evidence is—Accident at Crossing
Negligence Per Se. uniform that there were but two places where a stop could be profitably made, one at considerable distance, and the other very close to the crossing. Each had its advantages and its disadvantages. The de-

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ceased chose the remoter point, and there was evidence that in so doing she followed the usual habit of people at that crossing. This evidence of itself prevented the court from deciding it to be negligent *per se*. The usual and customary place of stopping by people using a road cannot be said, as matter of law, to be an improper or negligent place. The standard of negligence is what persons of ordinary prudence and carefulness would do under the same circumstances, and a general habit of the public to stop in a certain place is persuasive evidence that that place is the right one. The further the stopping place is from the track, the greater will be the chance of an intervening peril before actual crossing. The duty of the traveller is, there-

Negligence—Question for Jury.

fore, not only to keep a vigilant and continuous lookout, but to stop if a second place affords any increased facility to discover impending danger; but whether there is any such second place is a question of fact, which is for the jury, if at all in doubt. On this branch the present case is closely analogous and governed by *Whitman v. Railroad Co.*, 156 Pa. St. 175, and the remarks there made are applicable to the facts here: "If, notwithstanding the drawbacks of the place where plaintiff stopped, it still had sufficient advantages over other places to make it the habitual choice of travellers on that road, only a jury can say whether or not it was the best or a proper place to stop, and, even if it was, whether, considering its disadvantages, it was negligence in the plaintiff not to stop a second time on the level before reaching the track." See, also, *Ely v. Railway Co.*, 158 Pa. St. 233.

Several of the assignments of error are to the language of the charge. Its tone was certainly not commendable. It lacked judicial calmness, was unduly emotional, and in parts at least came dangerously near being inflammatory, as to damages, in an action of a class that peculiarly imposes on the judge the duty to repress natural sympathy with the injured and the suffering, and to hold the jury firmly down to the consideration of strict rights and responsibilities. Our

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books are not without cases of reversal for errors of this kind. But the nature of the issue, and the evidence and law applicable to it, were correctly set before the jury, and, though the tone of the charge was objectionable, we do not think it was so erroneous that we should reverse for that cause alone. Judgment affirmed.

CHASE

v.

MAINE CENT. R. R.

(*Supreme Judicial Court of Massachusetts, Jan. 9, 1897.*)

Accident at Crossing—Contributory Negligence.—A person approaching a railroad crossing at grade was driving at a moderate trot with the reins loose, without stopping or slackening his speed, or looking or listening for an approaching train, until, as the horse was about to cross the track, he attempted to stop it, and was struck and killed by an engine. *Held*, that he was guilty of such negligence as to prevent recovery for his death.

Same—Burden of Proof.—In an action to recover for the death of a person killed at a railroad crossing, the burden is on the plaintiff to show that the deceased exercised reasonable care and that he was not guilty of contributory negligence.

Obstruction of View of Crossing—Duty of Traveler.—If there is anything to obstruct the view of a traveler on a highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety.

REPORT from Suffolk county superior court. *Judgment on the verdict.*

Robert M. Morse and J. W. Spaulding, for plaintiff.
Strout & Coolidge and Henry N. Rice, for defendant.

LATHROP, J. This is an action of tort, at common law, for injuries sustained by the plaintiff's intestate, by reason of the wagon in which he was driving coming into collision with a train of cars of the defendant, at a place in Richmond, in the state of Maine, where a highway crossed the single-track road of the defendant, at grade. The accident happen-

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ed in the afternoon of August 17, 1887, and the trial took place in the superior court in January, 1896. The presiding judge, at the close of the plaintiff's evidence, ruled that the plaintiff had offered no testimony which would authorize the jury in finding that the intestate was in the exercise of such due care as is required by law to enable the plaintiff to recover. The report set forth sufficient acts of negligence on the part of the defendant, in running its train at a higher rate of speed than is allowed by law where a flagman or a gate is not maintained at a crossing at grade, and in not ringing a bell and sounding a whistle. On the question of due care on the part of the intestate, there was evidence tending to show the following facts: On the day of the accident, the intestate was driving a horse in an open Concord wagon, at a moderate trot, from Pleasant street, through South street, westerly towards and across the railroad. With him in the wagon was a boy, named Haley, who was then six years and eight months old, and who was the only witness produced who was present at the time of the accident. Pleasant street appears from a plan produced at the trial to be about 420 feet from the crossing on South street, where the accident occurred. As the intestate approached the track, he did not stop or slacken speed; but, when he got to the railroad, the horse started up, and attempted to cross the track in front of the train, which was approaching from the north. Then the intestate attempted to pull up the reins, which had been loose,—that is, not pulled up tight,—but did not stop the horse. The train struck the wagon, and the intestate and the boy were thrown violently therefrom, and the intestate died from his injuries 17 days afterwards. There was also evidence that when near the house of one Scott, which is about 50 feet from the crossing the intestate pulled out his watch, and looked at it; that the train which struck the wagon was known as the "Flying Yankee," and it passed through the town once a day, going south; that the time it was due was well known, approximately; that on the day of the accident it was

late, one witness testifying it was 19 minutes late ; and that the train was making no more noise than usual, and was accompanied by a great cloud of dust. There was also evidence that this train, in summer, was as likely to be late as on time. South street, from Pleasant street to the crossing, was a level, smooth road. There was evidence that the railroad, before reaching the crossing, passed through a cut, the highest point of which was 7 feet, 200 feet from the crossing. There were also some fences, $3\frac{1}{2}$ to 4 feet high, and a building and barn, and some fruit trees, all of which, it is contended, interfered with the view of the approaching train. It is obvious, however, that a man on the seat of an open Concord wagon would not have his view interfered with by the fences, or by the fact that the cars passed through the cut. The building and barn were on the corner of Pleasant street and South street, and could not have interfered with the intestate's line of vision except for a few moments, after turning into South street. If the fruit trees were high enough to obstruct the view of the intestate, it appears from the plans and photographs that, during nearly all the time he was on South street, these trees would not interfere with his seeing the train for a distance of, at least, 200 feet from the crossing until it arrived there.

The principal argument for the plaintiff is based upon the theory that the evidence shows that the railroad was visible but from two places on South street between Pleasant street and the crossing, namely, at a point 50 feet from the crossing, and from one further towards Pleasant street, the exact position of which is not clearly defined ; and that, when the intestate arrived at the last point, the train had not reached the point on the railroad visible from there, and at 50 feet from the crossing it was too late to do anything. So far as the testimony goes, we do not think that it supports the plaintiff's contention. It nowhere appears in the testimony that the railroad was visible from South street only from these two points. The report states as to the testimony of one Randlette as follows : "The

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witness testified as to one particular spot, which was fifty feet from the track, at which he could see, by close looking, the smokestack and the roof of the cars. The position of the train when seen from this spot was placed by the witness, successively, 'a little south of the Spruce street crossing, near the whistling post,' which was five hundred and fifty feet from the South street crossing, and finally at a point marked on the plan two hundred and seventy-three feet from the crossing." It does not appear from the report whether this witness was on the ground when he made his observation or seated on a wagon. The only other testimony comes from one Small, who, before the time of the accident, had ridden through the cut on locomotive engines. He testified that the South street crossing was visible from the cab of the engine, when the engine was about opposite the whistling post, and distant five hundred and fifty feet from the crossing. On cross-examination he testified that, when riding on the engine, he could see the crossing, and within a radius of 100 feet from the center of the crossing. He was then asked, "Could you see the people here?" and answered, "I never took any notice." This question was then put, "You never noticed whether you could or could not?" His answer was: "I can see all round here in the radius, you know. I, of course, never looked right over there." The report states that, at the last sentence, the witness pointed further to the east on South street than the radius of 100 feet from the center of the crossing. From the testimony of these witnesses the jury would not be warranted in finding that a person driving on South street could not see an approaching train except from two points; and, as we have already seen, the plans and photographs show an entirely different state of things.

The plaintiff further contends that the fact that the intestate pulled out his watch, and looked at it, when he was 50 feet from the crossing, would warrant the jury in finding that the regular time of the passing of

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the train was known to the intestate; that he looked to see if this time had passed; and that, when he found that it was 19 minutes after the time, he had a right to assume that it had passed. But his purpose in looking at his watch was purely a matter of conjecture. There is nothing to show that it was accompanied by any act or word indicating what his purpose was. The case presented then, is of a man approaching a railroad crossing at grade, driving with his reins loose, at a moderate trot without stopping or slackening speed, not looking or listening for an approaching train, and not thinking, apparently, anything about it, until, as he got to the railroad, the horse starts up, and attempts to cross the track, and the driver makes an effort to stop the horse, when it is too late. If this case had been tried in Maine, there can be no doubt that the plaintiff would not have been entitled to recover. It is well settled in that state that, where a collision occurs between a traveler upon the highway and a train of cars, it is *prima facie* evidence of negligence on the part of the traveler; that a person approaching a railroad crossing at grade must look and listen before passing over; and that, if his view is obstructed, he must stop and listen carefully. *Grows v. Railroad Co.*, 67 Me. 100; *State v. Railroad Co.*, 76 Me. 357; *Lesan v. Railroad Co.*, 77 Me. 85; *Chase v. Railroad Co.*, 78 Me. 353; *State v. Railroad Co.*, 80 Me. 430; *Smith v. Railroad Co.*, 87 Me. 339. We have no occasion to consider whether, as the cause of action accrued in Maine, the rules of law adopted by the highest court of that state should govern us in determining this case (see *Walsh v. Railroad Co.*, 160 Mass. 571); for we are of opinion that, on the evidence in this case, the ruling of the court below was right, according to our own decisions. The general rule in this commonwealth, undoubtedly, is that, as a railroad crossing is a dangerous place, a traveler on the highway is bound to make a reasonable use of his sense of sight as well as of hearing, in order to ascertain

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whether he will expose himself to danger; that if he fails so to use his senses, without reasonable excuse, he fails to use reasonable care;

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of Proof.

and that the burden is on the plaintiff to show such care, even though the defendant is in fault. *Butterfield v. Railroad*, 10 Allen, 532; *Allyn v. Railroad*, 105 Mass. 77; *Wright v. Railroad*, 129 Mass. 440; 2 Am. & Eng. R. Cas. 121; *Tully v. Railroad*, 134 Mass. 499; 14 Am. & Eng. R. Cas. 682; *Wheelwright v. Railroad*, 135 Mass. 225; 16 Am. & Eng. R. Cas. 315; *Allerton v. Railroad Co.*, 146 Mass. 241; *Fletcher v. Railroad Co.*, 149 Mass. 127; 39 Am. & Eng. R. Cas. 626; *Donnelly v. Railroad*, 151 Mass. 210; 42 Am. & Eng. R. Cas. 182; *Debbins v. Railroad Co.*, 154 Mass. 402; *Tyler v. Railroad Co.*, 157 Mass. 336. So, too, it may be said to be a general although not a universal rule that, if there is anything to

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of Crossing—Duty
of Traveler.

obstruct the view of a traveler on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety. *Fletcher v. Railroad Co.*, *ubi supra*, and cases cited; *Debbins v. Railroad Co.*, *ubi supra*. See *Hubbard v. Railroad Co.*, 162 Mass. 132. The case at bar is distinguishable from *Clark v. Railroad Co.*, 164 Mass. 434, and from *Conaty v. Railroad Co.*, 164 Mass. 572, in each of which cases an invitation was given to cross,—in the former case by waving a flag, and in the latter by raising the gates. Judgment on the verdict.

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BALTIMORE & O. S. W. R. Co.

v.

YOUNG.*

(*Supreme Court of Indiana, Dec. 4, 1896.*)

A complaint alleging a failure to give signals, sufficiently alleges negligence of defendant in an action for injuries at a crossing; and a general allegation of freedom from fault is a sufficient denial of plaintiff's contributory negligence; but it must affirmatively appear in the complaint that the negligence of the defendant was the proximate cause of plaintiff's injury.

APPEAL from Sullivan county circuit court. *Reversed.*

E. W. Strong, W. R. Gardiner, J. T. Hays, and W. H. De Wolf, for appellant.

Reilley & Emison, for appellee.

HACKNEY, J. The appellee sued and recovered for personal injuries sustained by him in a collision of a train with his wagon at the crossing of a highway and the railway of the then Ohio & Mississippi Railway Company, since consolidated with other companies and constituting the appellant. The complaint alleged that the crossing was upon a sharp descending grade, and the railway for a half mile north of the crossing ran through a cut 30 feet deep; that, 200 feet east of the highway, and within 20 feet of the railway, was a large and tall frame building, which obstructed a view of the railway by persons upon the highway approaching the crossing towards the east; that the highway, for the distance of a quarter of a mile before reaching the crossing, as he was going, was much lower than the railway at the crossing; that, by reason of said conditions, a train approaching said crossing from the northeast could not

*See notes at end of case,

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be seen within a quarter of a mile of said crossing, nor until the intersection was reached, by one traveling in the direction in which the appellee was driving. It was alleged that the appellee was familiar with the regular time of trains upon the road; that, as he approached the crossing, it was not the time for a train at that point, and he had no notice or knowledge that a train would then pass said crossing; that "as he was carefully and prudently driving along said highway, * * * approaching said railway at said crossing, he listened and looked carefully for a train, but heard none; that no bell was rung nor whistle blown, nor signal of any kind given, and he drove along said highway, and upon said crossing, at the place aforesaid; whereupon a long, heavy passenger train of cars, running at the rate of 60 miles an hour, without any notice or warning as aforesaid, ran against and upon him, in his wagon," inflicting the injuries complained of, "through no fault or negligence on his part." The appellant insists that its demurrer to the complaint should have been sustained, and the contention is now made that it was insufficient in its allegations of negligence and of the absence of contributory negligence on the part of the appellee, and that it failed to allege facts disclosing that the negligence of the company was the proximate cause of the injury.

It is the general rule in actions for negligence, and it is the rule in cases of the character of the present, that at least three propositions must concur before a liability arises: Negligence on the part of the defendant, which negligence is the proximate cause of the injury complained of, and that negligence of the person injured does not contribute to the injury. *Railway Co. v. Duncan*, 143 Ind. 524; *Railway Co. v. Stick*, 143 Ind. 449; *Faris v. Hoberg*, 134 Ind. 269; 16 Am. & Eng. Enc. Law, 422; *Elliott R. R. §§ 1155, 1156*; *Railway Co. v. Conn*, 104 Ind. 64; *Corporation v. Mathews*, 92 Ind. 213; *Railway Co. v. Engrer*, 4 Ind. App. 261; *Stone Co. v. Wray*, 10 Ind. App. 324; *Railroad Co. v. McKean*, 40 Ill. 218; *Cosgrove v. Railway Co.*, 13

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Hun, 329; *Barringer v. Railway Co.*, 18 Hun, 398. It has been so many times held that a complaint for negligence, to be sufficient, must allege the negligence of the defendant, and the freedom of the plaintiff from negligence, that we need not cite authority, upon the question of pleading, with reference to these two elements. We are not impressed with the claim that, with reference to these two elements of the case, the complaint is insufficient. The allegations of failure to give signals of the approach of the train to the crossing of the highway are sufficient, we have no doubt, to disclose the violation of a duty, expressly enjoined by statute. Rev. St. 1894, §§ 5307, 5308 (Rev. St. 1881, §§ 4020, 4021). The general allegation of freedom from fault on the part of the appellee has always been held sufficient in this state. The cases holding this rule have been fully collected in a note to 5 Enc. Pl. & Prac. p. 7. Nor do we agree with counsel for the appellant that the particular allegations as to the care exercised by the appellee are at variance with the general allegation of freedom from negligence. We may suggest, however, that, if the sufficiency of the complaint rested upon the particular allegations of care on his part, it would be very doubtful if it would be sufficient.

As to the essential element of liability that the negligence of the defendant shall be the proximate cause of the injury, it has been specially held, as a question of pleading, that the fact must affirmatively appear, to constitute a good complaint. *Railway Co. v. Conn*, *supra*; *Corporation v. Mathews*, *supra*; *Railway Co. v. Engerer*, *supra*; *Stone Co. v. Wray*, *supra*; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Railway Co. v. Krapf*, 143 Ind. 647. With reference to this element of liability it is said, in *Elliott R. R.*, *supra*: "The rule supported by the weight of authority, we think, is that one who violates the law is a wrongdoer; that, ordinarily, the omission of the statutory duty is negligence *per se*; and that, where the omission is established, such negligence arises as a matter of law. But such omission by

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no means conclusively establishes the company's liability, for the injured party must be free from fault, and the negligence of the company must have been the proximate cause of his injury, to enable him to recover,"—citing many authorities. Again, it is said, in the same section: "In no event is the omission to give the statutory signals sufficient, of itself, to make out a case, for there must be evidence showing that it was the proximate cause of the injury." In the complaint before us there is no allegation supplying this element of the liability sought to be enforced. To hold the complaint sufficient, we would be required to infer, from the alleged negligence of the company, the generally alleged care of the appellee, and his injury from the collision, that the company's negligence was the cause of the injury. Such an inference does not necessarily arise from the facts mentioned. Like facts were alleged in *Railway Co. v. Conn*, *supra*, and this court refused to draw this inference; and in *Pennsylvania Co. v. Gallentine*, *supra*, the complaint was held to be insufficient because it failed to show "that the injury was caused by, or resulted from, the negligence of the defendant." In *Railway Co. v. McKean*, *supra*, it was said, of a statute requiring signals at crossings, similar to our statute, *supra*, that "it is very evident the legislature did not intend to declare, nor have they so declared, that this omission of duty shall, *per se*, render them liable to damages for injuries. The injury must be shown, by circumstances, at least, to have been the consequence of, or caused by, such neglect." In *Barringer v. Railway Co.*, *supra*, and in *Cosgrove v. Railway Co.*, *supra*, it was held that the failure to give signals, the injury of the party, and his freedom from negligence did not justify a recovery, if the collision was from his inability to control his horse. It is said: "In such case the plaintiff cannot recover, not because the deceased was guilty of contributory negligence, but simply because his death was not caused by the negligence of the defendant." In *Railroad Co. v. Krapf*, *supra*, a complaint for negligence was held bad.

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for a failure to allege facts from which it could be inferred that the injury would not have happened but for the negligence of the defendant. Under the rule in that case the complaint before us is bad. There is no allegation that the appellee could have heard the signals, if given, nor that he could have avoided the collision if he had heard them before going upon the track. There is not even the general statement that the collision or injury was due to the omission of the company to give signals. We are not here dealing with the manner in which the fact should be alleged, but the question decided is that the complaint has no allegation of fact requiring the inference that the alleged negligence of the company was the proximate cause of the injury. The lower court, therefore, erred in overruling said demurrer, and the judgment is reversed, with instructions to sustain said demurrer.

NOTES.

Negating Contributory Negligence.—The authorities are well-nigh unanimous that, in an action for negligence, the plaintiff need not allege that the injury of which he complains was occasioned without his fault, or that he was not guilty of contributory negligence.

The Declaration Need not Negative Contributory Negligence.—*Goldthorpe v. Hardman*, 2 D. & L. 442, 13 M. & W. 377, 14 L. J. Exch. 61; *Dublin, etc., R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Knapp v. Salsbury*, 2 Campb. 500; *Knaresborough v. Belcher Silver Min. Co.*, 3 Sawy. (U. S.) 446; *Holmes v. Oregon, etc., R. Co.*, 6 Sawy. (U. S.) 262; *Conroy v. Oregon Constr. Co.*, 23 Fed. Rep. 71.

The Supreme Court of the United States has never directly passed upon this question, it would seem, though that court has repeatedly held that the burden rests upon the defendant to prove contributory negligence. *Texas, etc., R. Co. v. Volk*, 151 U. S. 73; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571; *Hough v. Texas, etc., R. Co.*, 100 U. S. 213; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; *Washington, etc., R. Co. v. Gladmon*, 15 Wall. (U. S.) 401.

Authoritative Expressions.—*New York.*—In *Hackford v. New York Cent., etc., R. Co.*, 6 Lans. (N. Y.) 381, 43 How. Pr. (N. Y.) 247, the court says: "No precedent of a common-law declaration in case for negligence can be found, I think, in which the plaintiff asserts that he was free from negligence, nor any decision that he is bound to make such proof." In *Lee v. Troy, etc., Gas Light Co.*, 98 N. Y. 115, the court says: "In the multitude of cases of this general character, we know of none which requires of the pleader any independ-

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ent or explicit allegation that the plaintiff himself was without fault."

Missouri.—In *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588, 25 Am. & Eng. R. Cas. 440, the court said: "It has been settled in this state, since the case of *Thompson v. North Missouri R. Co.*, 51 Mo. 191, that contributory negligence is a matter of defense, and that the onus of establishing it is on the defendant, and the rule has been reiterated in the late case of *Stephens v. Macon*, 83 Mo. 345. If the onus of proving contributory negligence, or of knowledge on the part of the plaintiff of defective machinery, rests on the defendant, it would be a singular rule of pleading to require a plaintiff to aver negatively that he was not guilty of contributory negligence, or did not have knowledge of defective machinery; neither one of which he would be required to prove to make out his case."

Prevalence of the Rule.—The rule stated in the text has been affirmed in the following states:

Alabama.—*Mary Lee Coal, etc., Co. v. Chambliss*, 97 Ala. 171; *Columbus, etc., R. Co. v. Bradford*, 86 Ala. 574; 38 Am. & Eng. R. Cas. 214; *Mobile, etc., R. Co. v. Crenshaw*, 65 Ala. 566; 8 Am. & Eng. R. Cas. 340; *Bromley v. Birmingham Mineral R. Co.*, 95 Ala. 397; *Holt v. Whatley*, 51 Ala. 569; *Smoot v. Wetumpka*, 24 Ala. 112; *Montgomery, etc., R. Co. v. Chambers*, 79 Ala. 338.

California.—*House v. Meyer*, 100 Cal. 592; *Boyd v. Oddous*, 97 Cal. 510; *Magee v. Northern Pac. Coast R. Co.*, 78 Cal. 430; *Yik Hon v. Spring Valley Water Works*, 65 Cal. 619; *Robinson v. Western Pac. R. Co.*, 48 Cal. 409.

Florida.—*Orlando v. Heard*, 29 Fla. 581.

Georgia.—*Augusta R. Co. v. Glover*, 92 Ga. 132; 58 Am. & Eng. R. Cas. 269; *Georgia Midland, etc., R. Co. v. Evans*, 87 Ga. 673.

Illinois.—*Consolidated Coal Co. v. Wombacher*, 134 Ill. 57; *Chicago, etc., R. Co. v. Hines*, 33 Ill. App. 271; *Chicago, etc., R. Co. v. Coss*, 73 Ill. 394; *Cox v. Brackett*, 41 Ill. 222. See, *contra*, *Chicago, etc., R. Co. v. Clough*, 134 Ill. 580; 45 Am. & Eng. R. Cas. 137, wherein it was held that failure to negative contributory negligence was waived, unless taken advantage of by demurrer or otherwise: the *obiter dictum* in *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, and *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358. In the last case, SCHOLFIELD, J., says: "From the earliest reported case in our reports, where the question was passed upon, to the present time—a period of time more than thirty years—the general rule has been declared and recognized in opinions announced from time to time, that, in order to recover for injuries from negligence, it must be alleged and proved that the party injured was, at the time he was injured, observing due or ordinary care for his personal safety." So much of this statement as announces the necessity to allege due care on the part of the plaintiff in *obiter dictum*, the question being upon whom rested the burden of proof; and none of the forty-three cases cited support such *dictum*, but all turn upon questions of evidence and instructions, except *Illinois Cent. R. Co. v. Simmons*, 38 Ill. 242, wherein it was held that a declaration containing no averment as to the due care of the plaintiff, if defective in that particular, was cured by the verdict; and *Chicago, etc., R. Co. v. Hazzard*, 26 Ill. 373, wherein the defendant filed a plea of not guilty, and the court, although it said that no question was raised as to the sufficiency of the declaration, remarked that "it would seem, on the

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principles of correct pleading, that his [the plaintiff's] exercise of proper care, as well as the negligence of the defendant, should be alleged in the declaration." In *Schmidt v. Sinnott*, 103 Ill. 160; *Chicago, etc., R. Co. v. Harwood*, 90 Ill. 425; and *Missouri Furnace Co. v. Abend*, 107 Ill. 44, three other of the cases cited, the declaration in each case alleged that the plaintiff exercised proper care, but the sufficiency of the declaration was not questioned or passed upon by the court. In *Chicago, etc., R. Co. v. Crowder*, 49 Ill. App. 154, the court used the language last above quoted; but the sufficiency of the declaration was not a question before the court.

Iowa.—*Mayer v. Chicago, etc., R. Co.*, 63 Iowa 562; *Albee v. Floyd County*, 46 Iowa 177. But see *Messenger v. Pate*, 42 Iowa 443, in which it was held sufficient to allege in general terms that the plaintiff was free from fault. See also *Gregory v. Woodworth*, (Iowa, 1895), 61 N. W. Rep. 962.

Kansas.—*Missouri Pac. R. Co. v. McCally*, 41 Kan. 639, 655; *Kansas City, etc., R. Co. v. Phillibert*, 25 Kan. 582; *Eskridge v. Lewis*, 51 Kan. 376.

Kentucky.—*Depp v. Louisville, etc., R. Co.* (Ky., 1890), 14 S. W. Rep. 363; *Louisville, etc., Canal Co. v. Murphy*, 9 Bush (Ky.) 522; *Louisville, etc., R. Co. v. Wolfe*, 80 Ky. 82; *Paducah, etc., R. Co. v. Hoehl*, 12 Bush (Ky.) 41.

Minnesota.—*Clark v. Chicago, etc., R. Co.*, 28 Minn. 69; *Hocum v. Weitherick*, 22 Minn. 152.

Mississippi.—*Hickman v. Kansas City, etc., R. Co.*, 66 Miss. 154, 38 Am. & Eng. R. Cas. 183.

Missouri.—*Thompson v. North Missouri R. Co.*, 51 Mo. 190; *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150; *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336; *St. Clair v. Missouri Pac. R. Co.*, 29 Mo. App. 76; *Donovan v. Hannibal, etc., R. Co.*, 89 Mo. 147; *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650; *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286; *Petty v. Hannibal, etc., R. Co.*, 88 Mo. 320, 28 Am. & Eng. R. Cas. 618; *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588; 25 Am. & Eng. R. Cas. 440; *Kersey v. Garton*, 77 Mo. 645; *Loyd v. Hannibal, etc., R. Co.*, 53 Mo. 509; *Fulks v. St. Louis, etc., R. Co.*, 111 Mo. 335, 52 Am. & Eng. R. Cas. 280; *Hall v. St. Joseph Water Co.*, 48 Mo. App. 356; *Young v. Shickle, etc., Iron Co.*, 103 Mo. 324; *Northrup v. Mississippi Valley Ins. Co.* 47 Mo. 435.

Montana.—*Higley v. Gilmer*, 3 Mont. 90.

Nebraska.—*Union Stock Yards Co. v. Conover*, 38 Neb. 488.

New Hampshire.—*Smith v. Eastern R. Co.*, 35 N. H. 356; *Corey v. Bath*, 35 N. H. 531.

New Jersey.—*Falk v. New York, etc., R. Co.*, 56 N. J. L. 380.

New York.—*Lee v. Troy Citizens' Gas Light Co.*, 98 N. Y. 115; *Mele v. Delaware, etc., Canal Co.*, 59 N. Y. Super. Ct. 367; *Urquhart v. Ogdensburg*, 23 Hun (N. Y.) 75; *Wolfe v. Richmond County*, 11 Abb. Pr. (N. Y. Supreme Ct.) 270, 19 How. Pr. (N. Y.) 370; *Hackford v. New York, etc., R. Co.*, 6 Lans. (N. Y.) 381, 43 How. Pr. (N. Y.) 247; *Haskell v. Penn Yan*, 5 Lans. (N. Y.) 48; *Robinson v. New York Cent., etc., R. Co.*, 65 Barb. (N. Y.) 146, *disapproving obiter* in *Warner v. New York Cent., etc. R. Co.*, 44 N. Y. 465.

North Carolina.—Under Acts North Carolina, 1887, c. 33, the defendant must plead contributory negligence. But the issue may be waived by consent, and need not be submitted to the jury. *De Berry v. Carolina Cent. R. Co.*, 100 N. Car. 310.

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North Dakota.—In *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252, it was held that the court properly refused to sustain "defendant's objection, made at the beginning of the trial, to the introduction of any evidence in support of the complaint, for the reason * * * that the averment and proof of the absence of negligence on plaintiff's part was an essential part of plaintiff's case." Said the court: "Respectable authority can be found sustaining defendant's position, but the decided weight of recent precedents justifies the ruling of the trial court."

Ohio.—*Cincinnati St. R. Co. v. Nolthenius*, 40 Ohio St. 376; *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541. In the former of these cases the court says, citing the latter: "If the plaintiff, in the averments of his petition necessary to state his cause of action, by reason of his relation to the defendant as agent, employee or otherwise, suggests the implication of negligence on his part, that implication must be negated by an allegation that he was without fault. * * * But where the relation between the parties does not require of the plaintiff any duty toward the means from which the injury resulted, beyond ordinary care to avoid injury no such averment is necessary. Where nothing more than ordinary care is required, that degree of care will be presumed." See also *Street R. Co. v. Fullbright*, 7 Cinc. L. Bull. (Ohio) 187.

Oregon.—*Johnston v. Oregon Short Line, etc., R. Co.*, 23 Oregon 94. In *Grant v. Baker*, 12 Oregon 329, the court held that the burden of proving contributory negligence is on the defendant, and said: "It has always been understood by this court that contributory negligence is a defense, and must be averred as such." But the plaintiff "must so frame his complaint as not to leave an inference that he was guilty of negligence that contributed to his injury." *Kahn v. Love*, 3 Oregon 206.

South Carolina.—*Donahue v. Enterprise R. Co.*, 32 S. Car. 299; *Darwin v. Charlotte, etc., R. Co.*, 23 S. Car. 531; *Carter v. Columbia, etc., R. Co.*, 19 S. Car. 20; *Crouch v. Charleston, etc., R. Co.*, 21 S. Car. 495.

Texas.—*Denison v. Sanford* (Tex. Civ. App., 1893), 21 S. W. Rep. 784; *San Antonio, etc., R. Co. v. Bennett*, 76 Tex. 151; *Missouri Pac. R. Co. v. Watson*, 72 Tex. 631; *Murray v. Gulf, etc., R. Co.*, 73 Tex. 2; *Gulf, etc., R. Co. v. Williams*, (Tex., 1888), 7 S. W. Rep. 88; *Texas, etc., R. Co. v. Murphy*, 46 Tex. 356; *Galveston Rope, etc., Co. v. Burkett*, 2 Tex. Civ. App. 308, which was a case in which a master's negligence consisted in knowingly employing an incompetent fellow-servant. It was held that the plaintiff need not allege ignorance of the fellow-servant's incapacity.

Virginia.—*Norfolk, etc., R. Co. v. Gilman*, 88 Va. 239; 48 Am. & Eng. R. Cas. 136; *Southwest Imp. Co. v. Andrew*, 86 Va. 270; *South West Imp. Co. v. Smith*, 85 Va. 306; *Baltimore, etc., R. Co. v. Whittington*, 30 Gratt. (Va.) 805.

Washington.—*Northern Pac. R. Co. v. Hess*, 2 Wash. 383; 48 Am. & Eng. R. Cas. 91.

West Virginia.—*Carrico v. West Virginia Cent., etc., R. Co.*, 35 W. Va. 389; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285; *Johnson v. Baltimore, etc., R. Co.*, 25 W. Va. 571; *Washington v. Baltimore, etc., R. Co.*, 17 W. Va. 190; *Snyder v. Pittsburgh, etc., R. Co.*, 11 W. Va. 14, followed in *Fowler v. Baltimore, etc., R. Co.*, 18 W. Va. 579, 8 Am. & Eng. R. Cas. 480, and *Sheff v. Huntington*, 16 W. Va. 307.

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Wisconsin.—Hoth *v. Peters*, 55 Wis. 405; Randall *v. Northwestern Tel. Co.*, 54 Wis. 140; Hoyt *v. Hudson*, 41 Wis. 105; Potter *v. Chicago, etc.*, R. Co., 20 Wis. 533.

Action against Innkeeper for Loss of Guest's Goods.—Since an innkeeper is *prima facie* liable for any loss or injury to the goods of his guest, not occasioned by the act of Providence, the public enemies or the fault of the guest, and the *prima facie* liability is based upon the presumption that the loss or injury arose from the negligence or fault of the innkeeper, contributory negligence of the guest is a matter of defense which the innkeeper must show to exculpate himself, and the complaint is sufficient without negating contributory negligence. *Bowell v. De Wald*, 2 Ind. App. 303.

The rule is that "it is not necessary to allege matters which would come more properly from the other side," and contributory negligence is considered a defense that the defendant must make.

Reason of the Rule.—Says Stephen, in his work on pleading, p. 350: "The meaning [of the rule] is that it is not necessary to anticipate the answer of the adversary; which, according to HALE, C. J., is 'like leaping before one comes to the stile,' citing *Bovy's Case*, 1 Vent. 217.

Burden of Proof.—As to the burden of proving contributory negligence, or that the plaintiff was free from fault, see article *Contributory Negligence*, in Am. & Eng. Ency. Law.

A Different Doctrine in Some States.—Though the general rule is, as above stated, that the plaintiff need not negative contributory negligence, yet there are courts of considerable respectability which require the plaintiff in an action founded upon negligence to aver that he was injured without fault on his part.

Plaintiff Must Negative Contributory Negligence.—In the following states the plaintiff must allege that the accident was caused without his fault:

Indiana.—Hochstettler *v. Mosier Coal, etc., Co.*, 8 Ind. App. 442; Pittsburgh, etc., R. Co. *v. Bennett*, 9 Ind. App. 92; Pittsburgh, etc., R. Co. *v. Burton*, 139 Ind. 357; Romona Oolitic Stone Co. *v. Tate*, (Ind. App. 1894), 37 N. E. Rep. 1065; Belt R., etc., Co. *v. Mann*, 107 Ind. 89; Louisville, etc., R. Co. *v. Bryan*, 107 Ind. 51; Fort Wayne *v. Coombs*, 107 Ind. 75; Ivens *v. Cincinnati, etc., R. Co.*, 103 Ind. 27; Louisville, etc., R. Co. *v. Schmidt*, 106 Ind. 73; Hammond *v. Schweitzer*, 112 Ind. 246; Ohio, etc., R. Co. *v. Hawkins*, 1 Ind. App. 213; Terre Haute, etc., R. Co. *v. Sherwood*, 132 Ind. 129; Rogers *v. Overton*, 87 Ind. 411; Pennsylvania Co. *v. Gallentine*, 77 Ind. 322; Williams *v. Moray*, 74 Ind. 25; Sullivan *v. Toledo, etc., R. Co.*, 58 Ind. 26; Higgins *v. Jeffersonville, etc., R. Co.*, 52 Ind. 110; Toledo, etc., R. Co. *v. Harris*, 49 Ind. 119; Jackson *v. Indianapolis, etc., R. Co.*, 47 Ind. 454; Maxfield *v. Cincinnati, etc., R. Co.*, 41 Ind. 269; Jeffersonville, etc., R. Co. *v. Bowen*, 40 Ind. 545; Gormley *v. Ohio, etc., R. Co.*, 72 Ind. 31; Jeffersonville, etc., R. Co. *v. Lyon*, 55 Ind. 477, 72 Ind. 107; Cincinnati, etc., R. Co. *v. Peters*, 80 Ind. 168; Louisville, etc., R. Co. *v. Lockridge*, 92 Ind. 191; Stevens *v. Lafayette, etc., Gravel Road Co.*, 99 Ind. 392; Cincinnati, etc., R. Co. *v. Butler*, 103 Ind. 31; Jeffersonville, etc., R. Co. *v. Underhill*, 40 Ind. 229; Cincinnati, etc., R. Co. *v. Eaton*, 53 Ind. 307; Lowrey *v. Delphi*, 55 Ind. 250; Hildebrand *v. Toledo, etc., R. Co.*, 47 Ind. 399; Indianapolis, etc., R. Co. *v. Robinson*, 35 Ind. 380; Jeffersonville R. Co. *v. Hendricks*, 26 Ind. 228; Toledo, etc., R. Co. *v. Bevin*, 26 Ind.

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443; *Michigan, etc., R. Co. v. Lantz*, 29 Ind. 528; *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185; *Evansville, etc., R. Co. v. Dexter*, 24 Ind. 411; *Riest v. Goshen*, 42 Ind. 339; *Wright v. Indianapolis, etc., R. Co.*, 18 Ind. 168; *Wabash, etc., Canal v. Mayer*, 10 Ind. 400; *Mount Vernon v. Dusouchett*, 2 Ind. 586.

Maine.—*Buzzell v. Laconia Mfg. Co.*, 48 Me. 113.

Maryland.—Under Code Md., art. 75, § 23, form 36, it is necessary to allege, in an action for an injury to a servant, that there was no contributory negligence on his part. *State v. Baltimore, etc., R. Co.*, 77 Md. 489.

Massachusetts.—*Fuller v. Boston, etc., R. Co.*, 133 Mass. 491; *Raymond v. Lowell*, 6 Cush. (Mass.) 524. But see *May v. Princeton*, 11 Met. (Mass.) 442, in which it was held that the plaintiff could prove that he was in the exercise of due care, under an allegation that he was injured "by reason of the defects aforesaid in a highway and want of repair aforesaid," although his own due care was not averred. In *Raymond v. Lowell*, 6 Cush. (Mass.) 524, in which plaintiff sought damages for an injury sustained by reason of a defective highway, an allegation that plaintiff was walking "in the due course of his business and in a proper manner," was held sufficient after verdict, and a motion in arrest of judgment was denied.

Michigan.—*Thompson v. Flint, etc., R. Co.*, 57 Mich. 300. See also *Denman v. Johnston*, 85 Mich. 387.

Rhode Island.—*Di Marcho v. Builders' Iron Foundry (R. I. 1892)*, 27 Atl. Rep. 328; *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376.

In Justices' Courts.—In *Indiana* the plaintiff must negative contributory negligence even in justices' courts. *Cincinnati, etc., R. Co. v. Stanley*, 4 Ind. App. 364 (Ind. App. 1891), 27 N. E. Rep. 316.

Freedom from Contributory Negligence Shown by Facts.—When the facts alleged by the plaintiff show that he was free from fault he may omit to allege that he was not guilty of contributory negligence. *Cleveland, etc., R. Co. v. Keely*, 138 Ind. 600; *Fort Wayne, etc., R. Co. v. Gruff*, 132 Ind. 13; *Pennsylvania Co. v. Davis*, 4 Ind. App. 51; *Duffy v. Howard*, 77 Ind. 182; *Indiana Mfg. Co. v. Millican*, 87 Ind. 87; *Jackson v. Indianapolis, etc., R. Co.*, 47 Ind. 454; *Evansville, etc., R. Co. v. Dexter*, 24 Ind. 411; *Michigan, etc., R. Co. v. Lantz*, 29 Ind. 528; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Higgins v. Jeffersonville, etc., R. Co.*, 52 Ind. 110; *Louisville, etc., R. Co. v. Boland*, 53 Ind. 398; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271. But in *Thompson v. Flint, etc., R. Co.*, 57 Mich. 300, which was an action for injuries received by the plaintiff by reason of his horse becoming frightened on account of the defective condition of a railroad crossing, an allegation that the plaintiff "took the horse by the bits, and attempted to lead him gently over said railroad at said crossing," was held to be insufficient in the absence of an averment of the actual exercise of due care.

Sickness and Loss of Time.—A petition which alleges that the accident occurred without fault on the plaintiff's part is good, without alleging that "he did not himself contribute to the sickness, loss of time and labor, and paralysis, for which he also claims damages." *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271.

Injury in Disaster of Great Magnitude.—In *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551, 21 Am. & Eng. R. Cas. 466, the plaintiff

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having been precipitated into a river by the giving way of a bridge over which he was traveling in a railroad train, it was held that his complaint was not bad for failure to allege that he was in the exercise of due care when he was injured, *MITCHELL, J.*, saying: "It is suggested in the argument that it does not appear but that he may have conducted himself negligently after the bridge went down, in the endeavor to extricate himself from the wreck, etc.; but we are not disposed to hold that a passenger who without fault becomes involved in a disaster of the apparent magnitude of that here described should be required to aver or prove that he acted with prudence and deliberation while so involved."

Averments in Lieu of Direct Negation of Contributory Negligence.

—In an action for injuries received on a railroad track, it is not sufficient to allege that the plaintiff was at the time lawfully on the track of the said railroad. *Indianapolis, etc., R. Co. v. Keely*, 23 Ind. 133.

It is not sufficient to allege that the plaintiff "has been" in the exercise of due care. *Richmond Gas Co. v. Baker*, (Ind. 1895), 39 N. E. Rep. 552.

Allegations Sufficient after Verdict.—In *Madison v. Baker*, 103 Ind. 41, an action for injuries received by a traveler on a defective street, allegations that the plaintiff, "having no knowledge of said ditch, and believing said highway to be in good repair, and while driving his wagon and team with care along the same, without any fault or negligence on his part" was injured by the upsetting of his wagon, etc., were held sufficient after verdict.

Illegal Sale of Intoxicating Liquor.—In an action by a wife against a liquor dealer for personal injuries and non-support due to the unlawful sale of intoxicating liquor by the defendant to her husband, she need not allege that she was free from contributory negligence. *Beem v. Chestnut*, 120 Ind. 390.

Negligent Use of Fire.—Where the injury complained of was caused by fire which the defendant negligently permitted to escape, it is not sufficient to allege that the fire was permitted to escape without the fault of the plaintiff, but it must be alleged that the plaintiff was not guilty of any negligence that contributed to the injury sustained by him. *Wabash, etc., R. Co. v. Johnson*, 96 Ind. 40.

Actions by Executors and Administrators.—In an action by a personal representative for the negligent killing of his decedent, it is unnecessary to allege freedom from fault on the part of such personal representative. *Indiana Mfg. Co. v. Millican*, 87 Ind. 87.

In Actions for Injuries to Infants—Due Care on the Part of Parents.—In *Pittsburg, etc., R. Co. v. Vining*, 27 Ind. 513, it was held that in an action for injury to a child seven years old, it was sufficient to allege that it was injured without fault of its parents, without alleging that the child was not guilty of negligence. And so in *Lafayette, etc., R. Co. v. Huffman*, 28 Ind. 287, such allegation was held sufficient where the child was five years old. In *New York, etc., R. Co. v. Mushrush*, 11 Ind. App. 192, the action was brought by a parent for the death of his twelve-year-old son, who had been run over by a train at a depot to which he had been sent to meet his sister. It being alleged that the parent was free from fault, it was held unnecessary to allege that the boy had sufficient discretion to go to the depot.

Due Care on the Part of Child Only.—In *Cleveland, etc., R. Co. v.*

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Keely, 138 Ind. 600, where the child was eleven years old, it was held sufficient to allege that he was free from fault. In Louisville, etc., Consol. R. Co. v. Pritchard, 131 Ind. 564, a complaint alleging that the plaintiff, an infant, was driving a two-horse team over a railroad track, and also alleging that he was in the exercise of due care, was held good, the age of the plaintiff not appearing.

Due Care on the Part of Both Parent and Child.—In Sullivan v. Toledo, etc., R. Co., 58 Ind. 26, it was held that in an action for the death of a minor child it should be alleged that both the child and its parents were without fault, and such allegation was held necessary also in *Terre Haute, etc., R. Co. v. Tappenbeck*, 9 Ind. App. 422, a case where the child was nine years old. A general averment that both a five-year-old infant and its parents were free from fault is sufficient, and such an allegation is a statement of fact and not a conclusion of law. *Washburn v. Chicago, etc., R. Co.*, 68 Wis. 474.

Sufficiency of General Averments.—But even in those jurisdictions, where the facts alleged raise no presumption of contributory negligence, a general averment that the injury was occasioned without the fault of the plaintiff is considered sufficient, without alleging specific acts to show the exercise of prudence, and without averring in so many words that the plaintiff was not guilty of contributory negligence.

Negating in General Terms.—Said the Supreme Court of *Indiana*, in *Ohio, etc., R. Co. v. Walker*, 113 Ind. 196, 32 Am. & Eng. R. Cas. 121, after collecting and reviewing the cases: "The rule that the general averment is sufficient has been so long established, and so often approved, that we should feel bound to adhere to it even if we doubted its soundness; but we think its soundness can be vindicated on principle. It is in the nature of a negative fact, and an averment of such a fact cannot be made with the same particularity as an affirmative one. The elementary books, recognizing this, agree that in such cases a general averment is ordinarily sufficient. It is evident that any other rule would be practically incapable of enforcement, for a negative fact can seldom be alleged, except generally and by way of denial, since any other course would require a process of exclusion and elimination that would lead to an almost endless pleading. If the specific facts absolving the plaintiff from fault must be pleaded, then it would be necessary to enumerate every fact that might be considered as tending to charge him with fault, and negative its existence. In some cases this process of enumeration and exclusion would be practically impossible. In others it would lead to a prolixity of pleading that would do no good, but would produce uncertainty and confusion."

In *Pittsburgh, etc., R. Co. v. Wright*, 80 Ind. 184, the court says: "The averment that the plaintiff was without fault is of a technical character and admits of any legitimate proof by which its truth can be established, and as matter of pleading it makes the complaint good in that respect against all mere inferences of contributory negligence, unless the inference arises as a necessary legal conclusion from the facts. Other cases declaring the same rule: *New York, etc., R. Co. v. Mushrush*, 11 Ind. App. 192; *Evansville, etc., R. Co. v. Krapf*, (Ind., 1894), 36 N. E. Rep. 901; *Kentucky, etc., Bridge Co. v. McKinney*, 9 Ind. App. 213; *Lake Erie, etc., R. Co. v. Griffin*, 8 Ind. App. 47; *Evansville, etc., R. Co., v. Weikle*, 6 Ind.

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App. 340; Chicago, etc., R. Co. v. Smith, 6 Ind. App. 262; Ohio, etc., R. Co. v. Hill, 7 Ind. App. 255; Citizens' St. R. Co. v. Merl, 134 Ind. 609; Phenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 56 Am. & Eng. R. Cas. 215; Evansville, etc., R. Co. v. Athon, 6 Ind. App. 295; Citizens' St. R. Co. v. Spahr, 7 Ind. App. 23; Fort Wayne, etc., R. Co. v. Gruff, 132 Ind. 13; Chicago, etc., Coal R. Co. v. McDaniel, 134 Ind. 166, Ohio, etc., R. Co. v. Levy, 134 Ind. 343; Pennsylvania Co. v. McCormack, 131 Ind. 250; Louisville, etc., Consol. R. Co. v. Summers, 131 Ind. 241; Ohio, etc., R. Co. v. McDanel, 5 Ind. App. 108; Mississinewa Min. Co. v. Patton, 129 Ind. 472; Louisville, etc., R. Co. v. Berry, 2 Ind. App. 427; Alexandria Min., etc., Co. v. Painter, 1 Ind. App. 587; Kentucky, etc., Bridge Co. v. Quinkert, 2 Ind. App. 244; Louisville, etc., R. Co. v. Stommel, 126 Ind. 35; Columbus v. Strassner, 124 Ind. 482; Chicago, etc., R. Co. v. Barnes, 2 Ind. App. 213; Allen County v. Creviston, 133 Ind. 39; Louisville, etc., R. Co. v. Sandford, 117 Ind. 265; Anderson v. Hervey, 67 Ind. 420; Evansville, etc., R. Co. v. Crist, 116 Ind. 446; Elkhart v. Witman, 122 Ind. 538; Pittsburgh, etc., R. Co. v. Hixon, 110 Ind. 225; Rushville v. Poe, 85 Ind. 83; Toledo, etc., R. Co. v. Brannagan, 75 Ind. 490; Lusk v. Davis, 27 Ind. 334; Gregory v. Woodworth (Iowa, 1895), 61 N. W. Rep. 962.

Not a Conclusion of Law.—In *Di Marcho v. Builders' Iron Foundry* (R. I. 1892), 27 Atl. Rep. 328, the court said: "The defendant objects to the sufficiency of the allegation that the plaintiff was in the exercise of due care. He insists that such an allegation is merely an inference or conclusion of law, and that the plaintiff should set forth particularly the acts he was engaged in doing at the time of receiving the injuries, so that it may appear whether or not he was in the exercise of due care. We do not agree with the defendant that the allegation that the plaintiff was in the exercise of due care is an inference or conclusion of law. It is rather, at least generally, an inference of fact;" but said they: "We think that the plaintiff may properly be required to state the particular work he was engaged in at the time of receiving the injuries, in connection with the allegation that he was in the exercise of due care."

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v.

MATHEWS.*

(*Supreme Court of the United States, Jan. 4, 1897.*)

Liability of Railroads for Fires from Locomotives—Validity of Statute.—A state statute making every railroad corporation owning or operating a railroad in the state responsible in damages for property of any person injured or destroyed by fire communicated

*See notes at end of case.

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by its locomotive engines, and declaring that such corporations have an insurable interest in property along their routes, and authorizing them to insure such property for their protection against such damages is a constitutional and valid exercise of the legislative power of the state, and does not deprive such corporations of their property without due process of law, nor does it deny to them the equal protection of the laws, nor does it impair the obligation of the contracts previously made between them and the state by their incorporation under general laws authorizing them to convey passengers and freight over their roads by the use of locomotive engines.

IN ERROR to the Supreme Court of the State of Missouri.

This was an action brought in an inferior court of the state of Missouri, by an owner of land in St. Louis county, against a railroad corporation organized under the laws of the state, and owning and operating with locomotive engines a line of railway adjoining the plaintiff's land, to recover damages for the destruction of the plaintiff's dwelling house, barn, out-buildings, shrubbery, and personal property upon that land, by fire communicated from one of those engines, on August 9, 1887.

The petition contained two counts,—the first of which alleged negligence on the part of the defendant, and the second did not, but was founded on the statute of Missouri of March 31, 1887, by which "each railroad corporation, owning or operating a railroad in this state, shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon the railroad owned or operated by such railroad corporation; and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf, for its protection against such damages." Laws 1887, p. 101; Rev. St. 1889, § 2615.

The answer, among other defenses, set up that the statute violated the constitution of the United States, by depriving the defendant of its property without due process of law, and by denying to it the equal protec-

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tion of the laws, and by impairing the obligation of the contract made between it and the state, "by the terms and provisions of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel said locomotive engines and cars attached thereto, and be responsible only for the negligent and careless use thereof."

The defendant was incorporated September 10, 1875, under the general laws of the state, which authorized railroad corporations to be formed by voluntary articles of association filed in the office of the secretary of state, and to lay out and construct their railroad, to take lands for the purpose, and "to take and convey persons and property on their railroad by the power or force of steam, or of animals, or by any mechanical power, and to receive compensation therefor." Gen. St. 1865, c. 63, §§ 1, 2; Rev. St. 1889, §§ 2542, 2543.

At the trial the plaintiff introduced evidence tending to support the allegations of the petition; and the court, at his request, instructed the jury that "if they believe, from the evidence, that during the month of August, 1887, plaintiff was the owner of the land in the petition described, and defendant was the owner or operating a railroad adjoining said land, having locomotive engines in use upon said road, and that on August 9, 1887, fire was communicated from a locomotive engine then in use upon the railroad owned or operated by defendant to plaintiff's property on his said land, and thereby the buildings and other property in the petition mentioned, or any of it, were destroyed, then the jury will find for the plaintiff."

The court refused to give to the jury the following instruction, requested by the defendant: "Though the jury may believe, from the evidence, that fire was communicated from a locomotive engine in use on defendant's railroad to plaintiff's property, as charged in the second count of plaintiff's petition, yet that fact is only *prima facie* evidence of negligence on the part of defendant, and, unless the jury believe from the whole evidence in the case, that said fire was either negligent-

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ly set out by defendant, or was communicated to plaintiff's property by reason of defendant's negligence, the plaintiff cannot recover."

The defendant excepted to the instruction given, as well as to the refusal to instruct as requested, and, after verdict and judgment for the plaintiff, appealed to the supreme court of the state, which held the statute to be constitutional, and affirmed the judgment. *Mathews v. St. Louis, etc., R. Co.*, 121 Mo. 298. The defendant sued out this writ of error.

D. D. Duncan and *L. F. Parker*, for plaintiff* in error.

Percy Werner and *Garland Pollard*, for defendant in error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The only question presented by the record, of which this court has jurisdiction, is whether there is anything inconsistent with the constitution of the United States in the statute of Missouri of March 31, 1887, by which every railroad corporation owning or operating a railroad in the state is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines, and is declared to have an insurable interest in property along its route, and authorized to insure such property, for its protection against such damages.

It has been strenuously argued, in behalf of the plaintiff in error, that this statute is an arbitrary, unreasonable, and unconstitutional exercise of legislative power, imposing an absolute and onerous liability for the consequences of doing a lawful act, and of conducting a lawful business in a lawful and careful manner, and that the statute violates the constitution of the United States, by depriving the railroad company of its property without due process of law, by denying to it the equal protection of the laws, and by impairing the obligation of the contract previously made between it and the state by its incorporation under general laws

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authorizing it to convey passengers and freight over its railroad by the use of locomotive engines.

The argument that this statute is in excess of the power of the legislature may be the most satisfactorily met by first tracing the history of the law regarding the liability of persons for fire originating on their own premises and spreading to the property of others.

At common law, every man appears to have been obliged, by the custom of the realm, to keep his fire safe, so that it should not injure his neighbor, and to have been liable to an action if a fire, lighted in his own house, or upon his land, by the act of himself, or of his servants or guests, burned the house or property of his neighbor, unless its spreading to his neighbor's property was caused by a violent tempest or other inevitable accident which he could not have foreseen. THIRNING, C. J., and MARKHAM, J., in *Beaulieu v. Finglam*, Y. B. 2 Hen. IV. p. 18; Anonymous, Cro. Eliz. 10; 1 Rolle, Abr. 1, "Action sur Case," B; 1 D'Anv. Abr. "Actions," B; *Turberville v. Stamp*, 1 Comyns, Rep. 32, 1 Salk. 13; Holt, 9; 1 Ld. Raym. 264; 12 Mod. 152; Com. Dig. "Action upon the Case for Negligence," A, 6; 1 Vin. Abr. 215, 216; 1 Bac. Abr. "Action on the Case," F (Am. Ed. 1852) p. 122; *Canterbury v. Attorney General*, 1 Phil. 316; *Filliter v. Phippard*, 11 Q. B. 347, 354; *Furlong v. Carroll*, 7 Ont. App. 145, 159.

The common-law liability in case of ordinary accident, without proof of negligence, was impliedly recognized in the statute of Anne, passed within 10 years after the decision in *Turberville v. Stamp*, above cited, and providing that "no action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby; any law or usage or custom to the contrary notwithstanding." St. 6 Anne (1707) c. 31 [58] § 7; 8 Statutes of the Realm, 795; St. 10 Anne (1711) c. 14 [24] § 1; 9 Statutes of the Realm, 684. By the statute

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of 14 Geo. III. (1774) c. 78, § 86, the statute of Anne was extended to "any person in whose house, chamber, stable, barn or other building, or on whose estate, any fire shall accidentally begin."

In modern times, in England, the strict rule of the common law as to civil liability in damages for fire originating on one's own land and spreading to property of another, has been recognized as still existing, except so far as clearly altered by statute.

In *Rex v. Pease*, 4 B. & Ad. 30, 1 N. & M. 690, a corporation expressly authorized by act of parliament to establish a railway between certain points, and to use locomotive engines thereon, was held not to be liable to an indictment for a nuisance by frightening horses traveling upon a highway parallel to the railroad.

In *Aldridge v. Railway Co.*, 3 M. & G. 515, 4 Scott, N. R. 156, which was an action against a railway corporation created by similar acts of parliament to recover damages for property destroyed by fire kindled by sparks from a locomotive engine, it was argued for the plaintiff that by the common law a civil action for damages could be sustained by proof of injury, without evidence of negligence. See *Broom*, Leg. Max. (5th Ed.) 366, 367; *Holmes*, Com. Law, 85-88. But the court held that the corporation could not be held liable, unless negligent. In *Piggot v. Railway Co.*, 3 C. B. 229, the same rule was recognized, although the fact of the property having been fired by sparks from the engine was held sufficient proof of negligence.

In the course of the argument in *Blyth v. Waterworks Co.*, 11 Exch. 781, 783, BARON MARTIN said: "I held, in a case tried at Liverpool, in 1853, that if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers,—that they were liable for all the consequences."

In *Vaughan v. Railway Co.*, 3 H. & N. 743, the court of exchequer held that a railway company, expressly authorized by its charter to use locomotive engines on its railway, was responsible for damages caused to

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property by fire communicated from such engines, although it had taken every precaution in its power to prevent the injury. But the judgment was reversed in the exchequer chamber, and LORD CHIEF JUSTICE COCKBURN said: "Although it may be true that, if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal, or using the instrument, yet, when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been used to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible." 5 H. & N., 679, 685.

The final decision in that case has since been considered in England as establishing that a railway company which by act of parliament has been expressly authorized to use locomotive engines upon its railway, without being declared to be responsible for fires communicated from those engines, is not, in the absence of negligence on its part, liable for damages caused by such fires. *Fremantle v. Railway Co.*, 10 C. B. N. S., 89; *Railway Co. v. Brand*, L. R. 4 H. L. 171; *Smith v. Railway Co.*, L. R. 6 C. P. 14, 21, 22; *Railway Co. v. Truman*, L. R. 11 App. 45.

On the other hand, a railway company, chartered by act of parliament in 1832 to make and maintain a "railway or tramroad for the passage of wagons, engines and other carriages" for the purpose of conveying coals and other minerals, and neither expressly authorized nor prohibited to use locomotive engines, was held liable for damages by sparks from such an engine, although proved to have taken all reasonable precautions to prevent the emission of sparks: MR. JUSTICE BLACKBURN saying that "the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are, therefore, at

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common law, bound to keep the engines from doing injury, and, if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part," and that, in order to bring them within the decision in *Vaughan v. Railway Co.*, above cited, "it is essential to show that their act authorized the use of locomotive engines, and it is not enough to show that it authorized the making and using of a railway, and that there are no words either prohibiting the use of locomotives or showing that the legislature meant to prohibit the use." *Jones v. Railway Co.*, L. R. 3 Q. B. 733.

So where acts of parliament, authorizing and regulating the use of locomotive engines on turnpike and other roads, provided that nothing in the acts contained should be construed as authorizing any person to use upon the highway a locomotive engine so constructed or used as to cause a public or private nuisance, and that every person so using such an engine should be liable to an action for such use, when such an action could have been maintained before the passage of the acts, the court of appeal held that a man who used upon a public highway a locomotive engine constructed in conformity with the provisions of the acts, and managed and conducted with all reasonable care and without negligence, was liable for a destruction of property on land adjoining the highway by sparks proceeding from his engine; LORD JUSTICE BRAMWELL saying: "The passing of the engine along the road is confessedly dangerous, inasmuch as sparks cannot be prevented from flying from it. It is conceded that, at common law, an action may be maintained for the injury suffered by the plaintiffs. The locomotive acts are relied upon as affording a defense; but, instead of helping the defendant, they show, not only that an action would have been maintainable at common law, but also that the right to sue for injury is carefully preserved. It is just and reasonable that, if a person uses a dangerous machine, he should pay for the damage which it occasions. If the reward which he gains

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for the use of the machine will not pay for the damage, it is mischievous to the public, and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage." *Powell v. Fall*, 5 Q. B. Div. 597.

In this country the strict rule of the common law of England as to liability for accidental fires has not been generally adopted; but the matter has been regulated, in many states, by statute. *Clark v. Foot*, 8 Johns. 329; *Bachelder v. Heagan*, 18 Me. 32; *Tourtellot v. Rosebrook*, 11 Met. (Mass.) 460; *Finley v. Langston*, 12 Mo. 120; *Miller v. Martin*, 16 Mo. 508; *Catron v. Nichols*, 81 Mo. 80; *Cooley, Torts*, 14, 590-592; 1 *Thomp. Neg.* 148-150.

In the colony of Massachusetts, from the first settlement, it was an object of legislation, "for the preservation of houses, hay, boards, timber, etc." 1 *Mass. Col. Rec.* (1631) 90; (1639) 281; 3 *Mass. Col. Rec.* (1646) 102. In 1660, or earlier, it was enacted that "whoever shall kindle any fires in the woods, or grounds lying in common, or inclosed, so as the same shall run into corn grounds or inclosures," at certain seasons, should "pay all damages, and half so much for a fine: * * * Provided that any man may kindle fire in his own ground so as no damage come thereby either to the country or to any particular person." *Mass. Col. Laws* 1660, p. 31; *Id.* 1672, p. 51.

Soon after the introduction of railroads into the United States, the legislature of the state of Massachusetts, by St. 1837, c. 226, provided that a railroad corporation should be held responsible in damages for any injury done to buildings or other property of others by fire communicated from its locomotive engines, "unless the said corporation shall show that they have used all due caution and diligence, and employed suitable expedients to prevent such injury," and that any railroad corporation should have an insurable interest in property along its route for which it might be so held

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responsible in damages, and might procure insurance thereon in its own behalf.

Three years later, that statute was repealed, and was re-enacted with the omission of the clause above quoted, thus making the liability of the railroad corporation absolute, and not dependent upon negligence on its part. And the statute in this form, with merely verbal changes, has been continued in force by successive re-enactments. St. 1840, c. 85; Gen. St. 1860, c. 63, § 101; St. 1874, c. 372, § 106; Pub. St. 1882, c. 112, § 214.

In the first reported case under this statute, it was held by the supreme judicial court of Massachusetts that the liability of the railroad company was not restricted to a building by the side of its road, which the very particles of fire emanating from the engines fell upon and kindled a flame in, but extended to a building across a street, set on fire by sparks wafted by the wind from the first building while it was burning; and CHIEF JUSTICE SHAW, in delivering judgment, said: "We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger, and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are; and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it." *Hart v. Railroad Corp.*, 13 Met. (Mass.) 99.

Two years afterwards, the same court adjudged that the statute applied to railroad companies incorporated before its passage, and that it extended as well to estates a part of which had been conveyed by the owner, as to those of which a part had been taken by law, for

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the purposes of a railroad ; and MR. JUSTICE DEWEY, in delivering judgment, said : " We can perceive no sound distinction between the cases supposed. Each of these modes for acquiring the necessary real estate for the purpose of a railroad is authorized both by the general laws and by the acts creating railroad corporations. In each, the landowner is supposed to receive full satisfaction for all the injuries necessarily resulting from the use of the same for a railroad. But, with the use of locomotive engines, greater hazard to contiguous buildings and property owned by the adjacent landowners may arise than was originally contemplated, or ought to be left to the ordinary common-law remedies. We consider this provision of St. 1840, c. 85, as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road as the occasion and circumstances may reasonably justify." *Lyman v. Railroad Corp.*, 4 Cush. (Mass.) 288.

The same statute was held to cover personal property in a building, and growing trees, destroyed by fire from a locomotive engine ; CHIEF JUSTICE BIGELOW saying : " It is not a penal statute, but purely remedial in its nature, and it is to be interpreted fairly and liberally, so as to secure to parties injured an indemnity from those who reap the advantages and profits arising from the use of a dangerous mode of locomotion, by means of which buildings and other property are destroyed. *Ross v. Railroad Co.*, 6 Allen (Mass.) 87.

Again, in *Ingersoll v. Railroad Co.*, 8 Allen (Mass.) 438, it was held, following *Hart v. Railroad Corp.*, above cited, to be immaterial that a building was destroyed by the spreading of a fire from other buildings on which the sparks from the engine had fallen, and it was also held to be immaterial that the building stood

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partly within the location of the railroad ; MR. JUSTICE HOAR saying : " The fact that a building or other property stands near a railroad, or partly or wholly on it, if placed there with the consent of the company, does not diminish their responsibility, in case it is injured by fire communicated from their locomotives. The legislature has chosen to make it a condition of the right to run carriages impelled by the agency of fire that the corporation employing them shall be responsible for all injuries which the fire may cause."

Upon facts very like those of that case, this court, at October term, 1875, sustained an action under a statute of Vermont, copied from the Massachusetts statute of 1837, and, speaking by MR. JUSTICE STRONG, said : " The statute was designed to be a remedial one. In Massachusetts, there is a statute almost identical with that of Vermont,"—and, referring to that case as directly in point, quoted the passage above cited from the opinion, ending with the words : " The legislature has chosen to make it a condition of the right to run carriages impelled by the agency of fire that the corporation employing them shall be responsible for all injuries which the fire may cause." *Railroad Co. v. Richardson*, 91 U. S. 454, 456, 472. The statute of Massachusetts, existing at the time of that decision and for 35 years before, and enforced in the Massachusetts cases, imposed a liability upon the railroad company, wholly independent of negligence on its part ; and the terms in which this court referred to that statute, and quoted from one of those cases, show that no doubt of its constitutionality was entertained.

In Maine and in New Hampshire, statutes substantially like the statute of Massachusetts of 1840, making railroad corporations absolutely liable, without regard to negligence, for injuries to property by fire communicated from their locomotive engines, were enacted in 1842, and have been since continued in force, and their validity upheld by the highest courts of those states, as applied to corporations created either before or after their passage. *St. Me.* 1842, c. 9, § 5 ; *Rev. St. Me.*

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1883, c. 51, § 64; Chapman v. Railroad Co., 37 Me. 92; Pratt v. Same, 42 Me. 579; Stearns v. Same, 46 Me. 95; Sherman v. Railroad Co., 86 Me. 422; Rev. St. N. H. 1842, c. 142, §§ 8, 9; Gen. St. N. H. 1867, c. 148, §§ 8, 9; Gen. Laws, N. H. 1878, c. 162, §§ 8, 9; Hooksett v. Railroad, 38 N. H. 242; Rowell v. Railroad, 57 N. H. 132; Smith v. Railroad, 63 N. H. 25.

In Connecticut, before any legislation towards holding railroad corporations liable for property burned by sparks from their locomotive engines, they were held not to be so liable if their use of such engines was with due care and skill, and in conformity with their charters. Burroughs v. Railroad Co., 15 Conn. 124. The subsequent legislation upon the subject, and the reasons for it, as stated by the supreme court of the state, were as follows: Experience demonstrated that in all cases of fire set by the operation of railroads it was extremely difficult, and in some cases impossible, to prove negligence, even when it existed. This led to the passage in 1840, and to the re-enactment in 1875, of a statute providing that, in all actions for any injury occasioned by fire communicated by any railway locomotive engine in the state, proof that such fire was so communicated should be *prima facie* evidence of negligence. St. 1840, c. 26; Gen. St. 1875, tit. 19, c. 11, § 29. Even then, the difficulty was but partially removed, for in most cases the defendant could easily produce evidence of due care, and the plaintiff would be ill-prepared to meet it. Therefore, in 1881, the legislature took the broad, equitable ground that, upon proof of the fact that the locomotive engine communicated fire to and destroyed property, the company should be liable, independently of the question of negligence, and accordingly enacted another statute, in the words of the Massachusetts statute of 1840, before mentioned, imposing an absolute liability, qualified only by the insertion of the words, "without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured." St. 1881, c. 92. The statutes of 1875 and 1881 were both re-enact-

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ed in Rev. St. 1888, §§ 1096, 3581. *Martin v. Railroad Co.*, 62 Conn. 331, 339; 56 Am. & Eng. R. Cas. 79. The provisions of the statute of 1881 have been repeatedly upheld and enforced. *Simmonds v. Railroad Co.*, 52 Conn. 264; *Grissell v. Railroad Co.*, 54 Conn. 447; *Regan v. Railroad Co.*, 60 Conn. 124; 49 Am. & Eng. R. Cas. 590; *Martin v. Same*, above cited.

In *Grissell v. Railroad Co.*, the validity of that statute was strongly assailed upon all the grounds taken by the plaintiff in error in the present case, and the court, in the course of a well-considered opinion, said: "It is a mistake to suppose that it necessarily transcends the limits of valid legislation, or violates the principle of a just equality before the law, if the one using extrahazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made to bear the risk and pay the loss thereby occasioned, if there is no fault on the part of the owner of the property, even though negligence in the other party cannot be proved." The court referred to early statutes of Connecticut, which required no proof of negligence in two classes of actions of tort,—the one making the owner of a dog, or, if the owner was a minor or an apprentice, his parent, guardian, or master, liable for all damage done by the dog (St. 1789; Laws 1796, p. 383; Gen. St. 1875, p. 267, § 3; Rev. St. 1888, § 3761; *Russell v. Tomlinson*, 2 Conn. 206; *Woolf v. Chalker*, 31 Conn. 121, 133); the other making every person setting a fire on his own or any land, that runs upon the land of any other person, liable for all damage done by the fire (Conn. Col. Laws 1750, p. 247; 2 Swift, Syst. Laws Conn. 81; Gen. St. 1875, p. 489, § 6; Rev. St. 1888, § 1344; *Grannis v. Cummings*, 25 Conn. 165; *Ayer v. Starkey*, 30 Conn. 304). The court added: "We are not aware that the validity of any of these statutes has been called in question. The dangerous character of the thing used is always to be considered in determining the validity of statutory regulations fixing the liability of parties so using it. Fire has always been subject to arbitrary regulations,

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and the common law of England was more severe and arbitrary on the subject than any statute. In Rolle's Abridgement ("Action on the Case," B. tit. "Fire") it is said: 'If my fire by misfortune burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So, if the fire is caused by a servant or a guest, or any person who entered the house with my consent. But otherwise if it is caused by a stranger who entered the house against my will.' * * *

There is no force in the suggestion that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons, whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that, too, for the sole profit of the corporation." *Gris-sell v. Housatonic R. Co.*, 54 Conn. 461, 462.

In Iowa, before the passage of any statute making railroad corporations responsible for damage done by sparks from their locomotive engines, it was held that no action could be maintained for such damage without proof of negligence on their part. *Gandy v. Railroad Co.*, 30 Iowa 420. The legislature then passed a statute providing that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway." Code 1873, § 1289. The supreme court of the state, assuming this statute to impose a liability independent of negligence, held it to be constitutional, and applicable to companies incorporated under general laws before its passage, and said: "The statute simply recognizes the doctrine that the use of the locomotive engine is the employment of

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a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks, and cause destructive conflagrations; that, when this occurs, loss must fall upon one or two innocent parties; that heretofore that loss has been borne by the owner of the property injured, but hereafter it shall be borne by the owner of the property causing the injury." "What the policy of this legislation may be, experience alone can show. It may be that it will prove to be unreasonably severe, and to stand in the way of material progress and the best interests of the country at large. It may, upon the other hand, promote a high degree of skill and care, and stimulate the invention and use of improved appliances, lessening the danger of fires, and greatly increasing the safety of property, without any detriment to public interests. With these questions we have nothing to do. For us it is enough to know that the statute contravenes no constitutional provision, state or national; and that it does not do so we entertain no doubt." *Rodemacher v. Railway Co.*, 41 Iowa, 297, 309. The subsequent decision, by a majority of the same court, cited by the plaintiff in error, that this statute only made the fact of an injury so occurring *prima facie* evidence of negligence, was based wholly upon a peculiar construction of this section in connection with other provisions of the Code, and in no degree upon any suggestion that, regarded as imposing an absolute liability, it would be unconstitutional. *Small v. Railroad Co.*, 50 Iowa, 338.

In a recent case in the circuit court of the United States for the Northern district of Iowa, JUDGE SHIRAS said: "The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the state; and it certainly cannot be denied that it is for the state to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control. The legislation of the state determines the width of the right

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of way used by the companies. The state may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings used by the company to be of stone, brick, or other like material, when built in cities or in close proximity to other buildings. The state, by legislation, may establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads." *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 62 Fed. Rep. 904, 907.

In Missouri, a statute was enacted in 1853, requiring railroad corporations, whether already existing or thereafter formed under the laws of the state, to erect and maintain fences on the sides of their railroads, where they passed through enclosed fields, with openings or gates or bars at farm crossings, and also cattle guards at all road crossings, suitable and sufficient to prevent cattle, horses, or other animals from getting upon the railroads, and, until such fences and cattle guards were duly made, making the corporation liable for all damages done by its agents or engines to animals on the railroad. *St. Feb. 24, 1853*, §§ 51, 56, (*Laws 1853*, pp. 143, 144). The supreme court of the state, following the opinion of CHIEF JUSTICE REDFIELD in the leading case of *Thorpe v. Railroad Co.*, 27 Vt. 140, and referring to *Lyman v. Railroad Corp.*, 4 Cush. (Mass.) 288, above stated, held the statute constitutional as applied to companies incorporated under general laws before its passage; and MR. JUSTICE SCOTT, in delivering judgment, said: "Where such dangerous and powerful agents as steam engines are brought into use, there should be a power in the legislature to prescribe such reasonable regulations as will prevent injuries resulting from their employment. The foresight of man is not competent to the task of prescribing in a charter all the regulations which time may show to be necessary for the security of the interests of the people of the state against injuries caused by the introduction of new, powerful, and dangerous agents for carrying on her intercourse and commerce. The

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charter must be taken subject to the understanding that, in its operation affecting the interests of society, it will be, like individuals, liable to be controlled by such reasonable enactments as may be dictated by a sense of what is required for the preservation of the persons, lives, and property of the people; such enactments not contravening the expressed or plainly implied provisions of the charter." *Gorman v. Railroad Co.*, 26 Mo. 441, 450, 451. That statute was afterwards re-enacted, modified by including uninclosed lands as well as inclosed or cultivated fields, and by making the corporation liable in double the amount of damages to cattle, horses, or other animals, occasioned by failure to construct or maintain such fences or cattle guards. Gen. St. 1865, c. 63, § 43; 1 Wag. St. c. 37, art 2, § 43; St. Feb. 18, 1875 (Laws 1875, p. 131); Rev. St. 1889, § 2611. And the statute, as so modified, and as applied to existing railroad corporations, was held to be valid by a decision of that court, affirmed by this court. *Humes v. Railway Co.*, 82 Mo. 221; *Id.* 115 U. S. 512; 22 Am. & Eng. R. Cas. 557.

In Missouri, before the passage of any statute concerning the liability of railroad corporations for fire communicated from their engines, they were held not to be liable unless negligent; but the fact of fire escaping from a passing engine and burning property of another was held to be *prima facie* evidence of negligence, and to throw upon the defendant the burden of proving that it supplied the best mechanical contrivances to prevent the fire from escaping, and that there was no negligence on the part of its servants. *Fitch v. Railroad Co.*, 45 Mo. 322; *Miller v. Railway Co.*, 90 Mo. 389. The statute of March 31, 1887, now in question (re-enacted in section 2615 of the Revised Statutes of 1889), changed the rule, by making the railroad corporation absolutely responsible in damages to the owners of property "injured or destroyed by fire communicated, directly or indirectly, by locomotive engines" in use upon its railroad, and providing that it should have an insurable interest in property along its route, and might

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procure insurance thereon in its own behalf, for its protection against such damages. The constitutionality of this statute was upheld by the supreme court of the state in full and able opinions in the case at bar, and in a similar case decided at the same time, and now argued with it in this court. *Mathews v. Railway Co.*, 121 Mo. 298, 61 Am. & Eng. R. Cas. 432; *Campbell v. Railway Co.*, 121 Mo. 340, 61 Am. & Eng. R. Cas. 462. In discussing the subject, the court said: "If the state is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of a good government. Certainly, it fails in the protection of property. The argument of the defendant, reduced to its last analysis, is this: 'The state authorized the railroad companies to propel cars by steam. To generate steam they are compelled to use fire. Therefore, they can lawfully use fire, and, as they are pursuing a lawful business, they are only liable for negligence in its operation; and when, in a given case, they can demonstrate they are guilty of no negligence, then they cannot be made liable.' To this the citizen answers: 'I also own my land lawfully. I have the right to grow my crops and erect buildings on it, at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of negligence. It results, then, that the state, which owes me protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The state has no right to take or damage my property without just compensation. But what the state cannot do directly, it attempts to do indirectly, through the charters granted to railroads, if defendant's contention be true. When it was demonstrated that, although the railroads exercised every precaution in the construction of their engines, the choice of their operatives, and clearing their rights of way of all combustibles, still fire was emitted from their engines, and the citizen's property burned, notwithstanding his efforts to extin-

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guish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the state to require the company who set out the fire to pay his damages." "The organic law of the state prescribed, before defendant obtained its charter, that 'the exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state.' Const. Mo. art. 12, § 5. Let it be conceded, for it is true, that, prior to the enactment of section 2615, by the decisions of this and other courts, defendant was only liable for negligence in setting out fire; is it to be concluded that the legislature is powerless to enact laws which will give ample protection to citizens against fires? Most certainly not. Fire, as one of the most dangerous elements, has ever been the subject of legislative control. It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law, before any statutes were enacted,"—quoting Rolle's Abridgment, before cited. Under ordinary circumstances, this was thought to be a harsh rule, and it was not generally adopted by the courts of the several states; but the question we are discussing is, not what the courts have generally regarded as the reasonable rule, but what is the power of the lawmaking power to adopt as a correct one." *Mathews v. Railway Co.*, 121 Mo. 315-317, 61 Am & Eng. R. Cas. 432.

Similar statutes have also been enacted, and held to be constitutional, in Colorado and in South Carolina. Colo. Ter. St., Jan. 13, 1874, § 3 (Laws 1874, p. 225); Gen. Laws Colo. 1877, art. 2237, § 3; Gen. St. Colo. 1883, §§ 1037, 2798; *Railway Co. v. De Busk*, 12 Colo. 294; Gen. St. S. C. 1882, § 1511; *McCandless v. Railroad Co.*, 38 S. Car. 103.

In *Railway Co. v. Kellogg*, 94 U. S. 469; in *Rail-*

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road Co. v. Lewis, 162 U. S. 366, and in Eddy v. Lafayette, 163 U. S. 456, in which it was assumed that negligence on the part of the defendant must be proved, the action was at common law, unaffected by any statute. And the statutes of some states make negligence an essential element in the liability of a railroad company for injuries by fire from its engines. 1 Thomp. Neg. 171.

The statute of Alabama of February 3, 1877 (Laws 1876-77, No. 39), which was held to be unconstitutional in Zeigler v. Railroad Co., 58 Ala. 594, cited by the plaintiff in error, was one providing that all corporations or persons, "owning or controlling any railroad in this state, shall be liable for all damages to live stock or cattle of any kind, caused by locomotives or railroad cars." Whatever may be thought of the correctness of that decision, no question of liability for fire was before the court, nor was any reference made to the statutes or decisions of other states upon this subject.

In each of the cases in Arkansas cited by the plaintiff in error, the decision was that a statute of the state, providing generally that "all railroads, which are now or may be hereafter built and operated, in whole or in part, in this state, shall be responsible for all damages to persons and property done or caused by the running of trains in this state," was not intended by the legislature to make the railroad company responsible for all damages, without regard to negligence, but only to shift the burden of proof upon the defendant. St. Feb. 3, 1875 (Mansf. Dig. § 5537); Railroad Co. v. Payne, 33 Ark. 816; Tilley v. Railway Co., 49 Ark. 535. The court, in the first of those cases, while expressing an opinion that "it was not within the province of the legislature to divest rights by prescribing to the courts what should be conclusive evidence," impliedly admitted, or at least cautiously abstained from denying, the validity of statutes like that now in question by saying: "In Massachusetts, by statute, railroad companies are made absolutely liable for injuries by fire communica-

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ted from their engines, but, in compensation, are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt." 33 Ark. 820.

The learning and diligence of counsel have failed to discover an instance in which a statute making railroad companies absolutely liable for damages by fire communicated from their locomotive engines to the property of others has been adjudged to be unconstitutional as to companies incorporated before or since its enactment.

This review of the authorities leads to the following conclusions :

First. The law of England, from the earliest times, held any one lighting a fire upon its own premises to the strictest accountability for damages caused by its spreading to the property of others.

Second. The earliest statute which declared railroad corporations to be absolutely responsible, independently of negligence, for damages by fire communicated from their locomotive engines to property of others, was passed in Massachusetts in 1840, soon after such engines had become common.

Third. In England, at the time of the passage of that statute, it was undetermined whether a railroad corporation, without negligence, was liable to a civil action, as at common law, for damages to property of others by fire from its locomotive engines ; and the result that it was not so liable was subsequently reached after some conflict of judicial opinion, and only when the acts of parliament had expressly authorized the corporation to use locomotive engines upon its railroad, and had not declared it to be responsible for such damages.

Fourth. From the time of the passage of the Massachusetts statute of 1840 to the present time, a period of more than half a century, the validity of that and similar statutes has been constantly upheld in the courts of every state of the Union in which the question has arisen.

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In this court, the constitutionality of such a statute has never been directly drawn into judgment. But it appears to have been assumed in *Railroad Co. v. Richardson*, 91 U. S. 454, 472, already cited; and it rests upon principles often affirmed here.

As was said by CHIEF JUSTICE SHAW, "it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *Com. v. Alger*, 7 Cush. (Mass.) 53, 84, 85. This court has often recognized and affirmed the fundamental principle so declared, and has more than once said: "Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations." *Slaughterhouse Cases*, 16 Wall. 36, 62; *Patterson v. Kentucky*, 97 U. S. 501, 505; *New Orleans Gas-Light Co. v. Louisiana Light, etc., Co.* 115 U. S. 650, 672; *Waterworks Co. v. Rivers*, 115 U. S. 674, 678; *Mugler v. Kansas*, 123 U. S. 623, 665.

In *Beer Co. v. Massachusetts*, 97 U. S. 25, 33, in which a statute of Massachusetts prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, was held to be constitutional and valid, as applied to a corporation chartered long before by the state for the purpose of manufacturing malt liquors, this court, speaking by MR. JUSTICE BRADLEY, said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract

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divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, '*Salus populi suprema lex*'; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In *Railway Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557, already mentioned, in which a statute of Missouri, making railroad corporations not fencing their railroads liable in double damages for injuries thereby occasioned to cattle and other animals, was held constitutional as applied to corporations existing before its enactment, this court, speaking by MR. JUSTICE FIELD, said: "If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them, as affecting life, liberty, or property without due process of law." "The law of Missouri, in requiring railroad corporations to erect fences, where their roads pass through, along, or adjoining inclosed or cultivated fields, or uninclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle, and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations." "In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattle guards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential."

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Missouri Pac. R. Co. v. Humes, 115 U. S. 520, 522, 22 Am. & Eng. R. Cas. 557.

"The objection that the statute of Missouri violates the clause of the fourteenth amendment, which prohibits a state to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle guards, is exacted, when its road passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality, where all companies are subjected to the same duties and liabilities under similar circumstances." Missouri Pac. R. Co. v. Humes, 115 U. S. 523, 22 Am. & Eng. R. Cas. 557.

Like decisions, for like reasons, were made in the similar cases of Railway Co. v. Beckwith, 129 U. S. 26, and Same v. Emmons, 149 U. S. 364, 56 Am. & Eng. R. Cas. 169, in which last case this court, again speaking by MR. JUSTICE FIELD, said: "The extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the states. No contract with any person, individual or corporate, can impose restrictions upon the power of the states in this respect." Railway Co. v. Emmons, 149 U. S. 367, 368, 56 Am. & Eng. R. Cas. 169.

In Railway Co. v. Mackey, 127 U. S. 205, the judgment of the supreme court of Kansas in 33 Kan. 298, maintaining the constitutionality of a statute of the state imposing for the future upon every railroad corporation, organized or doing business in the state, a

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liability, to which no person or corporation was before subject, for all damages done to any of its employees by negligence or mismanagement of their fellow-servants, was affirmed by this court, saying: "The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufactories." *Railway Co. v. Herrick*, 127 U. S. 210.

The motives which have induced, and the reasons which justify, the legislation now in question, may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile, and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall, and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost

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care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute now in question, which makes the railroad company liable in damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any particular property. *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420. The statute is not a penal one, imposing punishment for a violation of law, but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered. *Railroad Co. v. Richardson*, 91 U. S. 454, 472; *Huntington v. Attrill*, 146 U. S. 657.

The statute is a constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently, it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws.

Judgment affirmed.

NOTES.

Constitutionality of Statutes Making Railroad Companies Liable for All Damages by Fire.—After the exhaustive treatment of the subject by the principal case, little more need be said. In *Union Pac. R. Co. v. Debusk*, 38 Am. & Eng. R. Cas. 321, 12 Colo. 294, the

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Colorado statute of 1874 was held constitutional. This case was followed in *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159.

In *Grissell v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, the Connecticut act of 1881 making railroad companies responsible for injuries by fire communicated by their locomotives, and giving the companies an insurable interest in such property, was held not unconstitutional, as it neither denies equal protection of the law, nor takes property without due process of law, nor impairs the obligation of contracts.

In *Rodemacher v. Milwaukee, etc., R. Co.*, 41 Iowa 297, Iowa Code, § 1289, rendering companies liable for damages by fire, was held constitutional. In *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404, the act of 1885 making the occurrence of fire caused by the operation of a railroad *prima facie* evidence of negligence, was held not invalid for failing to clearly express the subject-matter of the act in the title, nor because it was partial and unequal in its operation. Federal corporations and railroads engaged in interstate commerce have been held not exempt by their federal constitutional rights from the operation of these statutes. *Diamond v. Northern Pac. R. Co.*, 29 Am. & Eng. R. Cas. 117; 6 Mont. 580; *Smith v. Boston*, 63 N. H. 25.

The provision as to damages from communicated fires along the right of way of a railroad does not abridge the privileges or immunities of the railroad corporation, nor deprive it of property without due process of law, nor deny to it the equal protection of the laws, within the meaning of the fourteenth amendment to the United States constitution. *McCandless v. Richmond, etc., R. Co.*, 38 S. Car. 103; *reviewing Danner v. South Carolina R. Co.*, 4 Rich (S. Car.) 329.

Nor is the obligation of any contract impaired by such an enactment, nor (the lessee being the corporation of another state) is there any interference with the control of Congress over interstate commerce. *McCandless v. Richmond, etc., R. Co.*, 38 S. Car. 103.

Nor is it in violation of those provisions of the state constitution which prohibit discriminations and unequal restraints and disqualifications, the dispossession of property otherwise than by the law of the land, and the taking of private property without consent or compensation. *McCandless v. Richmond, etc., R. Co.*, 38 S. Car. 103.

To the same effect see *Hooksett v. Concord R. Co.*, 38 N. H. 242; *Hart v. Western R. Co.*, 13 Met. (Mass.) 99; *Chapman v. Atlantic R. Co.*, 37 Me. 92.

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PATTESON

v.

CHESAPEAKE & O. R. Co.

(*Supreme Court of Appeals of Virginia, Dec. 3, 1896.*)

Fires Set by Locomotives—Negligence—Burden of Proof.—Where the origin of a fire has been fixed upon a railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used the best precautions known for confining sparks or cinders.

Same—Question for Jury.—Shortly after a train had passed, the plaintiff's barn was discovered to be on fire. There was a strong wind blowing from the direction of the train towards the barn, and the fire caught on top. The inspector of the railway company testified that he had inspected the engine at 6 p. m. on the day of the fire, eight hours after the fire occurred, and at 6 a. m. on the day following the fire, and that the engine was in good order, and had the latest style spark arrester. It appeared that there were several points on the road where the engine could have been repaired, if out of order, before being examined by the inspector. *Held*, that the question whether the fire was caused by the engine of the defendant company was for the jury, as was the question of the defendant's negligence.

APPEAL from Nelson county circuit court. *Reversed.*

W. D. Patteson and Caskie & Coleman, for appellant.

Chas. M. Blackford, H. T. Wickham, and Henry Taylor, Jr., for appellee.

HARRISON, J. This was an action in the circuit court of Nelson county to recover damages for the destruction of a barn and its contents, alleged to have been caused by fire communicated from the engine of the defendant. Case Stated.

There were two trials of the cause. On the first the jury found a verdict for \$1,000 for the plaintiff, which, upon motion of the defendant, was set aside. On the second trial the plaintiff introduced no evidence, and there was a verdict for the defendant; whereupon the

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plaintiff moved to set that verdict aside, and grant a new trial, which motion was overruled by the court, and judgment entered for the defendant.

All the evidence adduced upon the first trial is now before this court, having been duly incorporated in a bill of exceptions taken at the time, and signed by the presiding judge, and made a part of the record.

Under the rule prescribed by the legislature (Acts 1891-92, p. 962) this case must be considered by this court looking to the whole evidence adduced on the first trial, and, if it find that the circuit court erred in setting aside the first verdict, it must reinstate that verdict, and enter judgment thereon for the plaintiff; otherwise the verdict and judgment for the defendant on the second trial must stand.

Counsel have pressed with great earnestness the rule that the judgment of the lower court in setting aside a verdict because contrary to the law and the evidence is justly entitled to great weight, and that generally a stronger case should be made to justify an appellate court in reversing an order granting than one refusing a new trial. The rule is a wise one within proper limits. It cannot, however, be carried to the extent of depriving this court of the right of review in such cases as this. The statute already cited, which prescribes how such a case as this is to be considered, says that the appellate court shall look first to the evidence and proceedings on the first trial, and, if it discovers that the court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to said verdict, and enter judgment thereon.

If, therefore, this court shall become satisfied that the lower court, in setting aside the verdict, has disregarded the right of the jury to determine the weight of the evidence, or has in any other respect committed error, it should reverse its action. Unless it is so satisfied, the action of the lower court should be affirmed.

There was peculiar propriety in a jury weighing the evidence in this case and settling the issues between

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the parties, and the conclusion reached by them should not be disturbed unless there was a plain deviation from right and justice upon their part.

It appears that on the 10th of September, 1892, a loaded freight train, going west in the direction of Lynchburg over the road of the defendant company, passed, about 10 o'clock in the morning of that day, through the farm in Nelson county held by the plaintiff in trust for Mary E. Lewis and her children. The burned barn was situated in an open field, 940 feet from the railroad, on a point higher than the road, and at the head of a hollow leading from the railroad in the direction of the barn. The engine and train passed a few minutes before the barn was observed to be on fire, and the preponderance of evidence is that a strong wind was blowing from the engine in the direction of the barn, and that the hollow or draught leading from the railroad in that direction formed a channel up which there was a strong concentrated current of wind. It further appears that the barn took fire on top of the roof either of the main building or the shed, and was seen as soon as it caught; that the barn was kept locked, and no one had been to it since 7 o'clock in the morning of that day; that one of the owners and another person passed the barn a few minutes before the train did, and no fire was there then. Within a few minutes of the time that the barn took fire, and a short distance from it, two other fires occurred on the same side of the railroad with the barn—one a shock of fodder, 660 feet from the railroad; and the other a stack of hay, 600 feet therefrom—and both situated at a greater elevation above the railroad than the barn. Those witnesses who speak on the subject say it is impossible that the fire could have originated from any other cause than sparks or cinders emitted by the engine attached to the passing freight train, and the evidence nowhere suggests any other possible hypothesis.

The defendant insists that the burden was not only on the plaintiff to prove that the fire originated from sparks or cinders thrown out by the engine, but that

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such sparks or cinders were emitted by the engine because of defects in its construction or condition, and by reason of the fact that it was not equipped with the best appliances for arresting sparks and preventing the emission of burning cinders. In support of this proposition the case of *Bernard v. Railroad Co.*, 85 Va. 792, 8 S. E. 785, is cited and relied on. It is true, as a general rule, that where no negligence is proved on the part of the railroad company or any of its agents or employees, and negligence is the gravamen of the action, the law does not impute it. It lies on the party alleging it to prove it. It is, however, equally true that where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character. The law on this subject is well stated in 2 *Shear. & R. Neg.* § 676. It is there said :

“The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland, North Carolina, South Carolina, Tennessee, Illinois, Wisconsin, Missouri, Nebraska, and Texas ; and it is established by statute in Vermont, Illinois, Iowa, New Jersey, Minnesota, Kansas, Mississippi, and Utah. But it has been sometimes held that the plaintiff is bound to prove affirmatively some precaution which the defendant ought to have taken, and that it did not take it. This ruling is contrary to the plain principle that a party is not required to prove a fact which is necessarily much better known to his adversary than to himself, since the railroad company has unlimited opportunities for knowing the condition of its own engines, while its prosecutor has none at all, until he comes into court.

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Accordingly, such decisions have been overruled by statute in Iowa and Kansas, leaving Pennsylvania and Ohio to stand alone. In every case it is held that a presumption of negligence is raised by evidence that engines are, in common practice, so made as to retain their sparks, and that the particular engine in question did not. And if the particular engine from which the fire proceeded was so made, but it appears that, unless it was watched and kept in order, it would emit sparks, the inference may fairly be drawn that the fire was caused by negligence in its management. On the other hand, evidence that the engine which emitted the sparks had all the best appliances required by the rules previously stated, and was carefully handled, is sufficient to put the burden of proof again upon the plaintiff to show negligence."

It is well settled that testimony is admissible on the part of the plaintiff tending to show that the defendant's locomotive on occasions other than that for which the action is brought had emitted sparks and communicated fire to the property along its track and right of way, for the purpose of showing negligence on the part of the defendant's employees, or defects in the construction of the machinery in question. *Railroad Co. v. Thomas* (recently decided by this court) 24 S. E. 264. If proof of other fires establishes negligence on the part of the defendant, surely proof that the railroad caused the fire for which the action was brought must do so, the former being merely cumulative, and intended to show a negligent habit.

The rule laid down by the authorities cited, that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used the best precautions known for confining sparks or cinders, is a wise and just one. The law is liberal in holding that the railroad is exempt from liability when, operated in a lawful manner, and in the exercise of reasonable care and skill, it burns the property of the citizen along its

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route. To hold that the plaintiff, in addition to proving that the railroad is justly chargeable with the origin of the fire, must also prove affirmatively that its machinery was out of order, would practically defeat a recovery in most cases. The statement of the law as it seems to be laid down in *Bernard v. Railroad Co.*, 85 Va. 792, is not in accord with the view herein expressed, and is, therefore, not approved.

The defendant, notwithstanding its position that no obligation rested upon it to prove that its machinery was in order, introduced witnesses to establish that fact.

The only witness who professed to have any personal knowledge of the condition of the spark arrester was

W. A. Sutton, the night inspector of the engines at Second street shop, Richmond.

Name—Question
for Jury.

He testified that between 6 o'clock in the evening and 6 in the morning of Sunday, the 11th day of September, 1892, which was the next day after the fire, he had inspected the engine in question, and found it in good order, and equipped with the latest style spark arrester. He admitted, however, that he had no independent recollection of inspecting the engine, and only made the statement from a pencil report, upon which six engines appeared by their number, and among the number the one in question. The paper was marked "O. K.," as indicating that the engines were in order. Other witnesses testified that the spark arrester was in order, but admitted on cross-examination that they had no personal knowledge on the subject, and only made the statement upon the Sutton report. It appeared from the defendant's evidence that there were several points on the railroad where repairs could have been made between the point of the fire and the return of the engine to Richmond, where it was said to be examined by the inspector. The defendant undertook to prove further by expert witnesses that under no circumstances, whether the engine be out of order or not, could a coal cinder, large or small, escaping from the engine, be thrown a greater distance

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than 50 yards, or retain heat enough while passing through the air to ignite inflammable material at a greater distance than 50 yards from the engine. On the other hand, two unimpeached witnesses of the plaintiff testify that on former occasions they had stood in this barnyard, and seen sparks and cinders from a passing engine fall around them, and burn the hand of one of them.

Whether or not the fire was caused by the defendant, and whether or not the engine was out of order, or the spark arrester of an approved kind, were questions for the jury; and, being no doubt satisfied that the fire originated from sparks or cinders thrown from the engine, the other evidence was sufficient to justify their verdict; especially that of the defendant showing that it would be impossible for the fire to be thrown that distance if the spark arrester was in good order. Certainly it cannot be said that the conclusion reached by the jury was a plain deviation from right and justice.

For the foregoing reasons the judgment of the circuit court must be reversed, and judgment entered here upon the verdict rendered on the first trial.

FORD *et al.*

v.

DELTA & PINE LAND CO.

(*Supreme Court of the United States, Jan. 4, 1897.*)

Railway Companies—Exemption from Taxation.—An act chartering a railway company which exempts the property of such company from taxation does not extend to property which, not necessary for its business, it acquired under the authority of a subsequent act of the legislature, in which is found no exemption clause.

Same—Exemption from Special Assessments.—The exemption in such charter in no manner released the property from the burden of special assessments for the construction and repair of levees.

Payment of Taxes—Proof.—A state statute provided for the sale, by the auditor, of certain lands to a railway company, being lands

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forfeited for unpaid taxes, and that levee boards having any title or claim to any of such lands on account of unpaid levee taxes should receive in payment any of the bonds of the levee boards. Such sale having been made, the auditor gave to the company a deed to the lands, reciting that payment had been made in full of all state and county taxes due thereon. *Held*, that such deeds were not evidence of the payment of the levee taxes.

Levee Tax—Bonds—Payment—Trust Fund.—Where a state statute was passed providing for the issue of bonds in satisfaction of liabilities incurred for levee purposes, and authorizing an assessment on the lands benefited, the fund thereby created, whether in money or land, to be devoted to the payment of the bonds, such fund became a trust fund, which could not be diverted by any subsequent act of the legislature.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

This was a bill in equity filed in the circuit court of the United States for the Southern district of Mississippi, on February 27, 1889, by the appellants, as complainants, to quiet their title to certain lands therein described. Upon final hearing, on August 15, 1890, a decree was entered dismissing the bill (43 Fed. 181), from which decree the complainants have appealed to this court.

Case stated.

Complainants' chain of title is as follows: (1) A patent on March 13, 1853, from the United States to the state of Mississippi, under the act of September 4, 1841, (5 Stat. 453), and September 28, 1850 (9 Stat. 519); (2) conveyances from the state of Mississippi made during the years 1853 to 1856, inclusive, to E. F. Potts and others, these grantees having entered the lands with scrip issued by the secretary of state, under the acts of March 15 and March 16, 1852, providing for the construction of levees upon the Mississippi river (Laws Miss. 1852, pp. 33, 41); (3) deeds from the grantees of the state and their privies in interest, in the years 1871 and 1872, to the Selma, Marion & Memphis Railroad Company, made under the authority of an act of the legislature of the state approved July 21, 1870, authorizing the conveyance of lands to such company in payment of subscription to its capital stock (Laws Miss. 1870, c. 220, p. 566); (4) deeds from the state of Mississippi to the railroad company, of date March 18, 1873,

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executed under authority of an act of the legislature approved March 16, 1872 (Laws Miss. 1872, c. 75, p. 313), providing that all lands which had been sold to the railroad company, and which had become forfeited to the state for non-payment of taxes, might be bought by that company from the state at two cents per acre, upon satisfactory proof that not less than 25 miles of the company's road had been built, and also that in all cases in which the lands had been forfeited to or purchased by the levee boards in any of the levee districts in the state, and were held and claimed by them for the non-payment of levee taxes, the said boards were required to arrange for the payment of such taxes, by receiving therefor the bonds of the said districts; (5) deeds from the United States marshals for the Northern and Southern districts of Mississippi to the complainants, executed August 1, 1887, and February 5, 1889, under sales made pursuant to a judgment and decree rendered on July 6, 1886, by the circuit court of the United States for the Northern district of Mississippi in the case of *Timpson v. Selma, M. & M. R. Co.*

The title of the defendants was based upon various statutes of the state of Mississippi, providing for repairing and perfecting the levees of the Mississippi river in certain counties, and making assessments upon all the lands within certain boundaries for the cost of such improvements, and originated in tax sales made for the non-payment of such assessments.

Casey Young, for appellants.

Frank Johnston, for appellees.

MR. JUSTICE BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

We premise by saying that this case involves over 200 different tracts of land, in 9 separate counties, and amounting to 112,160 acres; that the titles to these various tracts, as claimed by complainants, are not all deraigned by the same conveyances, or subject to the same conditions; that, in consequence, the many questions discussed so elaborately by counsel in their brief

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and in oral arguments do not affect alike all the tracts. We shall not attempt to consider all the questions presented, but have endeavored to select those which are necessary for a final determination of the case. We believe that the title to every tract falls within the scope of those we shall discuss, and that the propositions laid down are decisive of the rights of the parties hereto.

It is insisted that the lands, while held by the railroad company, were, by virtue of certain clauses in its charter, exempt from the levee assessments; and we understood counsel, in their argument at the bar, to state that this question stands in the forefront of the case, and that, upon its decision in favor of the complainants their rights depend. The lands were in the years 1871 and 1872 conveyed by their former owners to the railroad company, in payment of stock subscriptions. The company, originally known as the Memphis, Holly Springs & Mobile Railroad Company, was chartered by an act of the legislature of the state, of date November 23, 1859 (Laws Miss. 1859, c. 14, p. 51). Sections 19 and 21 of that act are as follows:

"Sec. 19. That the capital stock, and all the property and effects of said company shall be exempt from taxation until said road is completed: provided, said road is commenced within two years and completed within ten years from and after the passage of this act."

"Sec. 21. That said road shall be commenced in three years and completed in twelve years after the passage of this act."

The Civil War interfering with the construction of the road, on February 20, 1867 (Laws Miss. 1867, c. 464, p. 635), an act was passed reviving the corporation. Section 2 reads: "That said company shall have sixteen years in which to construct the said road, and shall commence the same in three years from and after the passage of this act." Section 3 provides: "That it shall and may be lawful for the said corporators to receive subscriptions in land to the capital stock of the company: provided the lands shall be in five miles of

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the line of said road." On July 21, 1870 (Laws Miss. 1870 c. 220, p. 566), a further act was passed, the second section of which is: "That said Selma, Marion, and Memphis Railroad Company are hereby authorized to receive, in the way of subscription to the capital stock of said company, lands lying anywhere within the limits of the state of Mississippi." Under the authority of this statute, these lands, being all more than five miles from the line of the road, were conveyed to the company. Now, the contention is that section 19 of the original statute was operative to exempt these lands from any charge for levee assessments. It is contended that the general language "the capital stock and all the property and effects of said company" includes all the property belonging to the railroad company, whether used for railroad purposes or not; that it includes not only all the property which it acquired under the authority of its original charter, but also all property which it acquired under the authority of the amendment of July 21, 1870; and, finally, that the exemption from taxation means not merely exemption from all taxes levied for ordinary purposes by state, county, or city, but also all assessments for local improvements. These propositions are denied by the defendant, and certainly present the most important, if not the vital, questions in the case.

It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause. *Railroad Co. v. Dennis*, 116 U. S. 665, 24 Am. & Eng. R. Cas. 500; *Railroad Co. v. Guffey*, 120 U. S. 569, 29 Am. & Eng. R. Cas. 200; *Railroad Co. v. Thomas*, 132 U. S. 174, 41 Am. & Eng. R. Cas. 599; *Yazoo & M. V. R. Co. v. Board of Levee Com'rs, etc.*, 132 U. S. 190; *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S. 192; *People v. Cook*, 148 U. S. 397, 409; *Keokuk & W. R. Co. v. State of Missouri*, 152 U. S. 301, 60 Am. & Eng. R. Cas. 362; *Winona & St. P. Land Co. v. State of Minnesota*, 159 U. S. 526.

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Indeed, there has been strong judicial dissent from the doctrine of the power of the state legislature to create a permanent exemption from taxation. *University v. Rouse*, 8 Wall. 439, 443.

It has been frequently decided that a general exemption of the property of a corporation from taxation is to be construed as referring only to the property held for the transaction of the business of the company. *County of Ramsey v. Chicago, M. & St. P. R. Co.*, 33 Minn. 537; *County of Todd v. St. Paul, M. & M. R. Co.*, 38 Minn. 163; *Railroad Co. v. Irvin*, 72 Ill. 452; *In re Swigert*, 119 Ill. 83; *Camden & A. R. & Transp. Co. v. Commissioners of Mansfield*, 23 N. J. L. 510; *New Jersey R. & Transp. Co. v. Collectors, etc., of Newark*, 25 N. J. L. 315; *Vermont Cent. R. Co. v. Town of Burlington*, 28 Vt. 193; *Railroad Co. v. Berks Co.*, 6 Pa. St. 70; *Inhabitants of Worcester v. Western R. Co.*, 4 Met. (Mass.) 564; *Tucker v. Ferguson*, 22 Wall. 527; *Bank v. Tennessee*, 104 U. S. 493, 497. In this latter case, after referring to several of the authorities just cited, it was said: "The doctrine declared in them, that the exemption in cases like the one in the charter before us extends only to the property necessary for the business of the company, is founded in the wisest reasons of public policy. It would lead to infinite mischief if a corporation, simply by investing its funds in property not required for the purpose of its creation, could extend its immunity from taxation, and thus escape the common burden of the government."

The rule in Mississippi is the same, *McCulloch v. Stone*, 64 Miss. 378. In that case a railroad company, as here, was authorized to take subscriptions to its capital stock, payable in land. The charter also provided "that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road or for money borrowed, * * * and it shall be the duty of

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the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from the company an affidavit made by the president or cashier of said company that the amount of said taxes has actually been paid and applied by said company during the year in payment of the debts, * * * which receipt so given shall be in full of all taxes—county, state, and municipal—to which said company shall be subject.” Construing this provision, the supreme court held that outside lands (that is, lands not used in the business of the company) were not within the exemption. *McCulloch v. Stone*, 64 Miss. 394.

“The business of a railroad company, the property and instrumentalities ordinarily owned and employed by them, it must be assumed, were well known to the legislative department, and it must also be assumed that the language employed was used in reference to such business and property, unless a contrary intention is shown. ‘All taxes to which said company shall be subject’ must, therefore, we think, be construed to include only the taxes due upon the property of the company necessary to the construction, equipment, maintenance, and operation of its road. Many of the authorities upon the question here involved are collected by Cooley on Taxation (pages 146 to 153). From them we can deduce no principle of construction which would include in the exemption granted an exemption of the outlying lands owned by the company. The lands involved in this suit have no sort of connection with the business of the company. They are owned by it only as the same character of lands would be owned by a private individual, and for the same purposes. They were bought, not to enable the company to perform any duty it owes to the public, but that it might, by dealing in them, make a profit as a buyer and seller. In this character we find nothing in the words or spirit of the exemption clause giving immunity from taxation.”

Within the scope of these decisions, it is, to say the least, not clear that the general language in section 19

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is to be construed as referring to property other than that necessary for the business of the railroad company.

But, passing that, it is clear that even if the exemption is properly construed, as applying not only to the property necessary for the business of the railroad company, but also to all other property which by the terms of its charter, it was at liberty to acquire, it does not extend to property which, not necessary for its business, it acquired under the authority of a subsequent act of the legislature, in which is found no exemption clause. The act of 1867, reviving the charter, authorized the corporation to receive payment of subscriptions to its capital stock in lands, provided the lands were within five miles of the line of its road; and, if the exempting clause can be construed to apply to property other than that used in the business of the company, it would be limited to property which by the charter, as it then stood, it was authorized to acquire. Subsequently thereto, and in 1870, it was authorized to receive, in the way of subscription to its capital stock, lands lying anywhere within the limits of the state, and it was under this authority that it took title to the lands in question. Now, in this act of 1870 is no mention of any exemption, nothing to suggest that the legislature intended that this roving authority to take title to lands carried with it the right to withdraw all the lands thus taken from the burdens of taxation; and it would be clearly in violation of the accepted rule of construction in respect to contracts of exemption to extend the provisions of the exempting clause in the acts of 1859 and 1867 to property the right to acquire which was conferred solely by the subsequent act.

Again, it is insisted that section 19 of the act of 1859, which was not changed in any subsequent statute, made the exemption conditional upon the fact that the road was commenced within two years, and completed within ten years; that, as a matter of fact, this condition was not complied with; and hence that the exemption failed

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entirely. The argument is that all tax levies and sales of these lands were only conditionally invalid, and that, the condition failing, the tax sales became operative, and the title passed. On the other hand, it is said that this condition was a condition subsequent; that during the time prescribed in the condition the lands were exempt from taxation, even though after that time proceedings might be instituted under special warrant of the legislature for the assessment and collection of taxes thereon; and hence that all proceedings instituted and carried through during the pendency of such time of exemption were absolutely void. We do not deem it necessary to decide this question, and only refer to it as suggesting equitable considerations against any expansion of the claimed exemption.

But, further and chiefly, the only exemption was from taxation, and it is a general rule of construction that a clause exempting from taxation does not release the property so exempted from liability for assessments for local improvements. *Sheehan v. Hospital*, 50 Mo. 155; *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506; *Paterson v. Society*, 24 N. J. L. 385; *Protestant Foster Home Soc. v. Mayor, etc., of Newark*, 35 N. J. L. 157. This question was considered in this court in *Railroad Co. v. Decatur*, 147 U. S. 190; 54 Am. & Eng. R. Cas. 282. The exemption in that case was "from all taxes under the laws of this state" (Illinois); and it was held that that clause did not relieve the property from the burden of special assessments imposed to pay the cost of local improvements. The question was discussed at some length, and the various authorities reviewed in the opinion then delivered.

That is also the settled law of the state of Mississippi. *Daily v. Swope*, 47 Miss. 367; *Vasser v. George*, Id. 713; *Macon v. Patty*, 57 Miss. 378. In the first two of these cases it was held, not only that special assessments for local improvements did not come within the constitutional limitations as to taxation, but also that the construction and repair of levees

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were to be regarded as local improvements, for which the property specially benefited might be assessed. We quote from *Vasser v. George* (page 721):

“We are content to refer to our views on this subject, just delivered in *Daily v. Swope*. In that case we reached the conclusion that local assessments for local improvements were not embraced in the twentieth section of the twelfth article [said section reading ‘taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law’] but were referable to the general power of taxation, which was supreme, unless restrained by the constitution of the United States, or of the state. The limitation upon the power in that section only applies and governs taxes levied for the usual, ordinary, and general purposes of the state, county, and incorporated city or town, and does not include special assessments for local public objects for the purpose of ameliorating property and enhancing its value, and also contributing to the general convenience, health, or welfare of the community. That, in apportioning such assessments, the legislature or local taxing body may levy them on the basis of special benefits received, because of the improvement made, and, further, may adopt that mode which, in its discretion, seems equitable and just, either by specific taxes or according to value, or in the instance of a very small locality, as a street or square in a city, either the area of the lots, the front measurement, or value may be selected. So, too, in the levee district, composed of several counties and parts of counties, lands in the river counties, which are supposed to receive the largest benefit, may be assessed higher than those more remote. The legislature may classify the lands and tax accordingly.”

That such is now the settled law in Mississippi is not denied by counsel for complainants, but it is insisted that these decisions were subsequently to the vesting of title to those lands in the railroad company; that at that time the rule of decision in the state was differ-

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ent; and that the rights of the railroad company were created and vested under the rule as then announced; and also that no subsequent change in decision could disturb the rights created in reliance upon the previous rule. In support of this they refer to *Southern R. Co. v. Mayor, etc., of Jackson*, 38 Miss. 334, but that case does not sustain their contention. In it the railroad company claimed under a statute providing "that the stock, fixtures, and property of said company shall be exempt from taxation," but the taxes which were held included within the exemption were the general taxes of the city for corporate purposes. There was no special assessment for local improvements on property benefited thereby, but simply the ordinary taxes levied for corporate purposes, including, it is true, among them matters of public improvement. Such taxes come strictly within the provisions in respect to taxation. A city is a municipal corporation, a political subdivision of the state, charged with certain specified duties of government within its territorial limits, and for the full discharge of those duties it is authorized to levy taxes. In this respect it does not differ from a county, and, although some of the funds derived from a city tax may have been used for public improvement, that does not change the character of the tax. It does not cease to be a "tax," properly so called, any more than would a tax levied by the state if a portion of the funds raised thereby were invested in the building of a capitol, or any other public improvement. This is the only decision of the supreme court of the state to which our attention is directed as enunciating a doctrine different from that laid down in the cases in 47 and 57 Miss., *supra*. The rule, therefore, established in Mississippi is in harmony with that recognized generally elsewhere, to the effect that special assessments for local improvements are not within the purview of either constitutional limitations in respect to taxation or general exemptions from taxation. It follows, therefore, that the exemption in this charter in no manner released the property from the

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burden of the special assessments for the construction and repair of the levees.

These special assessments for levee improvements culminated in sales and deeds under express authority of the statutes of the state, and by them a perfect title was transferred, which finally passed to the defendant. No defects are pointed out by the complainants in these proceedings ; at least, none which go so far as to vitiate those proceedings if the property was subject to such assessments. This conclusion disposes of the principal question in this case.

We may, however, go further, and consider some other matters in reference to these assessments. On March 16, 1872, the legislature passed an act to facilitate the construction of the railroad (Laws Miss., 1872, p. 313, c. 75), section 3 of which reads :

“That all lands which have heretofore been purchased by or forfeited to the state of Mississippi, for taxes due and unpaid thereon, and which have been sold to said Selma, Marion, and Memphis Railroad Company by the original owners of the same, shall be sold to said railroad company by the auditor of public accounts, at two cents per acre, upon the presentation of satisfactory evidence of titles to said railroad company, from said original owners, and satisfactory proof that not less than twenty-five miles of said road has been constructed : provided, the title to the lands shall have been conveyed by said owners to said company, prior to the passage of this act, and that in all cases where the said lands have been forfeited to or purchased by any of the levee boards in the levee districts in this state, in which any of the said lands lie, and are now held or claimed by any of the said levee boards for the non-payment of the levee taxes, and where the title is held by said railroad company, said levee boards are hereby required to arrange for the payment of said taxes by receiving in payment of the same, any of the bonds of the levee boards : provided, that if the said Selma, Marion, and Memphis Railroad shall receive the \$4,000.00 subsidy per mile, the said railroad shall

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pay into the state treasury one and one-half of one per cent. on the gross earnings of said road, for every mile of said road in this state, beginning two years after they receive the first subsidy: provided, further, that this tax shall only be levied until said railroad company shall be required to pay tax on its property."

Under the authority of this statute, the auditor conveyed these lands to the company by deed which recited that the lands had been "sold to the state of Mississippi for taxes due the said state," and that the company had paid into the state treasury two cents per acre "in full of all state and county taxes due thereon to the present date." No reference was made in these deeds to the levee taxes; no recital of any payment of them, or of any adjustments with the levee commissioners. Complainants contend that the deeds are themselves evidence of a prior payment and discharge of the levee taxes, on the theory that such payment was a statutory prerequisite to the conveyance by the auditor. *Nofire v. U. S.*, 164 U. S. 657. We do not so understand the force of the statute. The transactions with the auditor and with the levee board were independent of each other. The auditor sold and conveyed at two cents an acre for all state and county taxes, *i. e.*, all taxes which the state had full authority over, and which it could compromise at any sum. The levee board held the lands in trust, and the company was required to pay all levee taxes in full, either in cash or in levee bonds, the obligations for which the lands were sold. The two tribunals acted separately. Neither's action was conditioned upon that of the other; and proof of the action of one is no evidence of the action of the other.

It is true that the punctuation of the statute gives plausibility to a different construction, but it is well settled that punctuation is not decisive. A colon after the word "act" in the first proviso would have made the meaning more apparent. A proviso is not always a condition, much less a condition precedent. As, for instance, the last two provisos in this section. There

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is no evidence in the record of the payment of the levee taxes by the railroad company, or any one for it, or for the complainants. On the other hand, it does affirmatively appear that the title held by the levee board to these lands has passed to the defendant. In order to a clear understanding of this, reference must be had to the legislation of the state in respect to levee construction and repair.

The levee system was inaugurated prior to the Civil War, and some work was done thereon, and some debts contracted thereby. On February 13, 1867 (Laws Miss., 1867, p. 237), an act was passed creating a board of commissioners, consisting of three persons, for the liquidation of all outstanding liabilities incurred for levee purposes, providing for the issue of bonds in satisfaction of such liabilities, and an annual assessment of five cents per acre on certain lands, and three cents per acre on certain other lands, supposed to be benefited by the construction of the levees, and directing that the fund thereby created, whether in money or land, should be devoted to the payment of such bonds. All the lands in controversy were sold under the authority of this statute for delinquent levee taxes, and purchased by the levee board, and were so held at the time of the conveyances to the railroad company. Thereafter, and in 1877, Josiah Green, the holder of \$85,000 of the levee bonds, filed a bill in the chancery court of Hinds county, in behalf of himself and all other holders of said bonds, against the state auditor and state treasurer (who had been by statute substituted for the levee board), to subject these lands to the satisfaction of such indebtedness. On appeal to the supreme court of the state it was held (*Gibbs v. Green*, 54 Miss. 592) that the act of February 13, 1867, was a legislative proposition to the holders of claims against the original levee board, which, when accepted by such claimants, created a contract beyond the power of the state to disturb, and that under that contract the taxes received and the lands sold for non-payment of taxes became a

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trust fund, which could not be diverted by any subsequent act of the legislature.

In pursuance of that decision, a decree was finally entered, ordering a sale of all such lands so conveyed to the levee board for non-payment of delinquent levee taxes in satisfaction of the claims of these bondholders. These lands were sold under that decree, and the title acquired thereby passed by subsequent mesne conveyances to the defendant. It is insisted by the complainants that, as the railroad company was not a party to these proceedings, they do not conclude its rights; that they were, as to it and parties holding under it, *res inter alios acta*. Be that as it may, this decision, followed, as it was, by subsequent decisions of the supreme court, is a construction of the act of 1867, which is not only binding upon this court, but also commends itself to our judgment as a just recognition of the force of legislative contracts. Inasmuch as we have seen the auditor's deeds are not to be taken as an adjudication that such levee taxes had been paid by the railroad company, and as it was, under the true construction of the statute of 1867, the intent of the legislature that, in addition to the 2 per cent. for general taxes, all levee assessments should be paid and discharged by the railroad company, and as there is no evidence before us that such payment and discharge were made, it follows that all the title acquired by the levee board under the act of 1867 has passed to the defendant.

The examination we have thus made of the tax questions in this case renders unnecessary any inquiry into the validity of the judicial sales by which the complainants claim to have acquired the title of the railroad company, for by those sales, if they took anything, they took no more than the railroad company had, and whatever title it may ever have had was, as we have seen, divested by the tax proceedings.

The decree of the circuit court was right, and it is affirmed.

Alabama G. S. R. Co. v. City of Bessemer.

ALABAMA G. S. R. Co.

v.

CITY OF BESSEMER.

(Supreme Court of Alabama.)

Railroads—City License Tax—Interstate Commerce—Validity.—The fact that a railway company is engaged in interstate commerce does not render a city license tax imposed by a city on such company for the privilege of doing business in the city null and void as contrary to the interstate commerce provisions of the United States constitution.

Municipal Corporations—Power to Impose License Tax.—A statutory charter conferring the power upon a municipality to levy such license tax on railway companies is not violative of a provision in the state constitution forbidding the legislature from authorizing cities to pass ordinances not in accord with the state laws.

APPEAL from Jefferson county circuit court. *Affirmed.*

Smith & Weatherly, for appellant.

The appellee sued the appellant to recover a city license tax, levied by the city of Bessemer by ordinance upon the appellant, for the privilege of doing business in said city "by carrying passengers or freight, either or both, from Bessemer to other points in the state, and for one dollar for a fee for issuing said license." The defendant filed several pleas, denying that it was liable for or owes to the plaintiff the sum sued for, on the ground, among others, that it was doing the business of a common carrier, and engaged, among other things, in interstate commerce, and that the alleged ordinance of the city was null and void, and contrary to article 1, § 8, of the constitution of the United States, in that it attempts to impose a tax upon interstate commerce, and to regulate the conditions upon which such commerce may be carried on,

Case stated.

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in a portion of the state of Alabama. The cause was tried by the court without the intervention of a jury, and judgment rendered for the plaintiff. From this judgment the present appeal is prosecuted.

This court holds that the ordinance of the city was not void, and that the statutory charter conferring the power upon the municipality to levy such a license tax was not violative of the constitution of Alabama, citing *Holt v. Mayor, etc.*, (Ala.) 19 So. Rep. 735; *City of Anniston v. Southern R. Co.* (Ala.) 20 So. Rep. 915. The judgment is affirmed.

MILWAUKEE ELECTRIC RAILWAY & LIGHT CO.

v.

CITY OF MILWAUKEE.

(*Supreme Court of Wisconsin, Jan. 12, 1897.*)

Street-Railway Companies—Assessments—Exemption.—A state statute providing for the payment of licenses by street-railway companies within the state provided that such license should be in lieu of all other taxes, assessments, and licenses of any such corporation, and all personal property, franchises, and real estate owned by such company or corporation should be exempt from assessment and taxation; that all land or lots unimproved, or having buildings thereon, owned by any such company or corporation, should be liable to taxation for state, county, and school purposes. *Held*, that such exemption was not limited to property of such company or corporation used for railway purposes.

Same—Power of Legislature to Exempt Property.—A provision in the constitution of a state that it shall be the duty of the legislature "to restrict" the power of taxation and assessment of municipal corporations so as to prevent abuses in assessment and taxation, does not affect the power of the legislature to exempt property.

APPEAL from Milwaukee county circuit court. *Reversed* on plaintiff's appeal and *affirmed* on defendants' appeal.

This is an action to enjoin and restrain the city of Milwaukee, its officers, etc., from selling, offering for

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sale, or returning delinquent certain special taxes assessed or levied against the property of the plaintiff, described in the exhibit annexed to the complaint, and from issuing any certificate, or certificates of sale thereon, and praying that the assessment and levy of said taxes or special assessments be declared void and of no effect, etc. It appeared from the complaint that the plaintiff was a corporation, created and existing for constructing and equipping, leasing, maintaining, and operating by electricity or other power street railways for the transportation of passengers and material in the city and county of Milwaukee, and for other purposes; that its property consisted of about 120 miles of railway track, mostly within said city, together with all posts, wires, and other furniture incidental to and used by a street railway operated by electricity, and that the plaintiff had acquired certain pieces of real estate in various portions of the city upon which are situated its power houses, barns, paint shops, and other buildings necessary for the conduct of its business; that it had paid, pursuant to chapter 363, Laws 1895, to the state treasurer, before February 1, 1896, a sum of money equal to the percentage of its gross receipts for the 12 preceding months as shown by its duly-verified statement as filed with the county treasurer of Milwaukee county, and as provided by said statute; that the said defendant city assessed all the real estate of said plaintiff for state, county, and school purposes, and, in addition thereto, had assessed against said property special assessments for various purposes, namely, street sprinkling, repairing sidewalks, laying water pipe, removing snow, for general city, interest, and ward tax, and certificates of the board of public works for grading, graveling, paving, and curbing streets, amounting in all to \$1,219.15, in items shown in the exhibit annexed to the complaint, and it was charged that said special assessments were assessed without authority of law, illegally, and contrary to the express provisions of the statutes of the state; that the defendants threaten and are

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about to collect said taxes, and sell said real estate, and to issue the usual certificates of sale thereon to the purchaser of said property; and that the assessment and levy of said taxes constitute a cloud upon the title to said real estate. It was also stated in the complaint that the plaintiff was ready and willing and thereby offered to pay any taxes or assessments which the court might determine it should in justice pay. A temporary injunctive order was granted at the time of the commencement of the action, in substance as prayed for. The defendants, in their answer, alleged that the plaintiff had, in addition to the property necessary for its use in its street-railway business, and essential and devoted to that business, other real estate, not so essential and devoted, but which was vacant or unused property, and part of which was leased for purposes entirely foreign to the street-railway business, and upon which some of the assessments set forth in the complaint were levied; and it was denied that the special assessments set forth in the complaint were assessed for the city, without authority of law, and expressly alleged that by the terms of section 12, c. 184, subc. 20, Laws 1874,—being the charter of the city of Milwaukee,—it was provided that real estate exempted from taxation by the laws of the state should be subject to special taxes, as other real estate, and that said provision had not been repealed; and the defendants denied that it was within the power of the legislature to prohibit the city of Milwaukee from levying special assessments upon real estate for benefits arising thereto from improvements made pursuant to law, and denied that all of the plaintiff's property was an entirety, which could not be divided and sold separately, but alleged that numerous parcels and parts of the real estate owned thereby were not essential to the enjoyment of its franchises, and in no wise constitute a portion of an entirety; and, except as above denied, defendants admit all the allegations of the complaint. Motion was made to vacate the preliminary injunction, upon which a reference was made to a court commissioner to take

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testimony and report to the court as to what use, if any, was made of plaintiff's real estate mentioned in the complaint, and whether the same was improved or unimproved. The referee reported that all of the described property, except certain specified lots, was used by the plaintiff for railroad purposes. The court confirmed the report of the referee, and ordered that the temporary injunction be vacated and set aside as to the tracts not used for railroad purposes, and that it be granted and continued in force as to the other assessments mentioned in the complaint. From that part of the order vacating said injunction in part the plaintiff appealed, and the defendants appealed from so much of the order as granted and continued the injunction as to the assessments on lots used for railroad purposes.

Miller, Noyes, Miller & Wahl, for appellant.

Charles H. Hamilton, for respondents.

PINNEY, J. (after stating the facts). By section 6, c. 363, Laws 1895, of the act to provide for the payment of licenses by street-railway companies within this state, it is provided that the license fee therein provided for "shall be in lieu of all other taxes, assessments, and licenses of any such corporation, and all personal property, franchises, and real estate owned by such company or corporation shall be exempt from assessment and taxation; that all land or lots unimproved, or having buildings thereon, owned by any such person, company, or corporation, shall be liable to taxation for state, county, and school purposes." This action concerns certain city assessments, which are special taxes. The exemption of the lots in question from these assessments is in clear and unqualified terms, and it is shown that the plaintiff had paid its annual license fee, as required by the statute, which was required to be computed as follows: "One per cent. on the first \$250,000 of its gross receipts; one and one-half per cent. upon the gross receipts over \$250,000, and not exceeding \$500,000; and

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ments—Exemption.

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two per cent. on all amounts over \$500,000." The validity of this act was not questioned as being in conflict with section 1, art. 8, of the constitution, which requires that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe"; and it appears to be in conformity with the construction this provision of the constitution received in *Wisconsin Cent. R. Co. v. Taylor Co.*, 52 Wis. 37; *Wisconsin Cent. R. Co. v. Lincoln Co.*, 57 Wis. 142; and *Green Bay & M. Canal Co. v. Outagamie Co.*, 76 Wis. 588. It is contended that the exemption in question should be construed as if it had been expressly limited to property of the street-railway company used for railway purposes, and the circuit court so construed it. We are unable to arrive at this conclusion, for to do so would require us to read into the statute words not found in it, and to give effect to a supposed intent not indicated by the language of the act. The exemption from assessment extends "to all personal property, franchises and real estate owned by any such company." This court holds that in all such cases "it is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing." *Hanson v. Eichstaedt*, 69 Wis. 546. We have no right to import into the act a limitation or restriction not found in it. The case of *Brightman v. Kirner*, 22 Wis. 58, is decisive against the contention of the defendants, and, if it were a question of construction, the act would have to be liberally construed in favor of the street-railway company, for the reasons stated in *Milwaukee & St. P. R. Co. v. City of Milwaukee*, 34 Wis. 271; *Milwaukee & St. P. R. Co. v. Board of Sup'rs of Crawford Co.*, 29 Wis. 116; *State v. McFetridge*, 64 Wis. 130. It is true that exemptions of property from taxation are, in general, to be construed strictly; but in the present case there is no language in the act justifying or requiring construction. The terms of the act are so clear as to exclude all occasion for it. If the act is unfair and inequitable, that is a question for the legislature, and the courts have no power to remedy it.

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2. It is contended that the legislature has no power to exempt the plaintiff's lots from assessments, for the reason that section 3, art. 11, of the constitution provides that: "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations." The power of imposing assessments, such as are here in question, is essentially a legislative power delegated to the city and its proper officers, in like manner as the power of general taxation. The argument of the defendants' counsel would prove too much, and show that the legislature could not select the subjects of taxation, so as to exempt from taxation a particular class or kind of property, as the power of assessments and taxation are mentioned in the same connection. The power of the legislature to exempt particular classes or kinds of property from taxation is well settled. Assessments are special taxes, and the power to exempt particular classes or kinds of property from assessments stands on as clear and undoubted ground as the power to make exemptions, in such cases, from general taxation. The entire matter of assessments was made a subject of legislative regulation and control, and we see no reason for doubting or denying the validity of the exemption claimed. It follows from these views that the part of the order appealed from by the plaintiff must be reversed, and the part appealed from by the defendants must be affirmed. Judgment is ordered accordingly, and the case is remanded to the circuit court for further proceedings according to law.

None - Power of
Legislature to Ex-
empt Property.

Illinois Cent. R. Co. v. Kankakee.

ILLINOIS CENT. R. CO.

v.

CITY OF KANKAKEE.

(*Supreme Court of Illinois, Jan. 19, 1897.*)

Railways—Assessment for Street Improvements—Validity.—A railroad right of way, running parallel to a street, is assessable for special benefits arising from local street improvements.

APPEAL from Kankakee county court. *Affirmed.*

On December 18, 1895, appellee, the city of Kankakee, passed an ordinance providing for the improvement, by paving, curbing, etc., of that part of East avenue lying between Court street on the north and Hickory street on the south, to be paid for by a special assessment upon the realty specially benefited thereby, so far as the same could be legally assessed, and the balance by general taxation. The part of East avenue involved in this controversy adjoins and runs parallel with the right of way of the railroad of appellant the length of three blocks. At the north end of the proposed pavement East avenue is about 15 feet higher than the track of appellant, and falls rapidly towards the south, so that, one block south, at Merchant street (which does not extend across the tracks), both are about on a level. Continuing south, to the next cross street (Station street), the avenue and tracks are nearly on a level, but at Hickory, the third cross street south, the tracks are higher than the avenue. The station is located opposite Station street. Commissioners were appointed, who estimated the probable cost of the improvement at \$11,048.60. The petition of appellee was filed in the county court, and commissioners were appointed to spread the assessment. The total sum thus to be raised was fixed at \$9,100.60, and the right of way of appellant was assessed at \$1,500. Upon the

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return of the assessment appellant filed objections, which were heard by the court, a jury being waived. Evidence was submitted, and the court found that appellant's realty was not assessed more than it would be benefited, and the objections were overruled. From a judgment against the realty of appellant for \$1,500 the Illinois Central Railroad Company appeals to this court.

W. R. Hunter, for appellant.

Paddock & Cooper, for appellee.

WILKIN, J. (after stating the facts). On the trial below appellant submitted to the court 13 written propositions of law, embodying the law relating to special assessments, all of which the court held, except the tenth, which is: "That, under the law and evidence, said real property of said company, assessed for said improvement, will not be specially benefited thereby." That the railroad right of way, relatively situated, is assessable for special benefits arising from local street improvements, is settled by repeated decisions of this court. *Kuehner v. City of Freeport*, 143 Ill. 92; *Rich v. City of Chicago*, 152 Ill. 18, and cases there cited. Proposition 10, as a proposition of law, was therefore rightly refused. The only question, then, presented by this record for our consideration, is one of fact. Counsel insist that, under the evidence herein, to an unprejudiced judicial mind, the proposed improvement will not specially benefit the right of way. Whether or not, as a matter of fact, the property was specially benefited, and, if so, the amount of the benefit, was a question for the court, under all the evidence. The report of the commissioners, by the express provisions of the statute, made a *prima facie* case for the city. The evidence introduced by appellant to overcome that *prima facie* case, and that offered by the city in rebuttal, was conflicting; and, after carefully considering all the evidence, we cannot say that the court erred in its conclusion that the assessment was fair and reasonable. The judgment of the county court will be affirmed.

New Whatcom v. Bellingham Bay, &c., R. Co.

CITY OF NEW WHATCOM

v.

BELLINGHAM BAY & B. C. R. Co.

(*Supreme Court of Washington, Dec. 8, 1896.*)

Assessment of Railways for Street Improvements—Validity.—When a state statute provides "that all property benefited by the improvement shall be assessed to the extent of its proportionate part of the expense thereof" an assessment for street improvements made against a railway company which failed to appear and object to such assessment is valid.

APPEAL from Whatcom county superior court. *Affirmed.*

Newman & Howard, for appellant.

T. E. Cade, D. W. Freeman, and Kerr & McCord, for respondent.

PER CURIAM. The facts presented in this case are similar to those in the cases between the city and the Bellingham Bay Improvement Company, recently decided (47 Pac. Rep. 236), with the exception that the defendant contends that a railroad track cannot be assessed for benefits in making street improvements; and a number of authorities have been cited upon this proposition by both parties. But the statute upon which this proceeding was had provides "that all property benefited by the improvement shall be assessed to the extent of its proportionate part of the expense thereof." Laws 1893, p. 227, §§ 1, 2. It is not within our province to say that a railroad track and right of way cannot be benefited under any circumstances by the construction of street improvements; and as it may have been benefited in this instance, and the defendant did not appear and object to the assessment, we think the judgment should be affirmed.

SOUTHERN R. CO.

v.

CARNEGIE STEEL CO., LIMITED.

(Circuit Court of Appeals, Fourth Circuit, Nov. 10, 1896.)

Priority of Supply Debts.—Where a railroad company has gone into the hands of receivers, debts for supplies necessary to keep the company a going concern, incurred a reasonable time before the receivership, must be paid before any of the earnings are applied to permanent improvements, rentals, and interest on the mortgage debt.

Reasonable Time.—In such cases regard must be had to the special circumstances of each particular case, in determining what is a reasonable time.

Filing of Claim against Insolvent—Laches.—Where a receiver was appointed for a railway company, at the instance of its creditors and stockholders, to protect the property until a reorganization could be effected, there was a strong equity in favor of the supply creditors, and a creditor who furnished steel rails for such company between 9 and 11 months before the appointment of the receiver, and took notes of the company therefor, renewing them, prior to the receivership, according to agreement in the contract of sale, and putting in its claim as soon after the appointment of the receiver as the notes matured did not lose its claim through laches.

Diversion of Assets—Equity of Supply Creditor.—If, after the appointment of receivers under a creditors' bill, there came into their hands earnings which were expended for the betterment of the mortgaged property, instead of being applied to the payment of debts for current supplies, contracted within a reasonable time before the receivership, then, as against the mortgage bondholders so benefited, the supply creditor has an equity to have those earnings restored and applied to his debt.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

The Richmond & Danville Railroad Company was a corporation created by the laws of the state of Virginia. It became the owner of several other railroads, and the lessee of others, and it created and maintained a great system of railroads traversing several states. The main road, that of the Richmond & Danville, was successful in its management and prosperous to a degree;

but the necessity of the system required that many portions of it, which were not productive, should be kept up, although operated at a loss. These were a drain upon, and wholly exhausted, the surplus received from the better portion of the system. The expenses attending the operation and preservation of the great system were enormous, and it became necessary to reorganize. To this end, a bill was filed by creditors and others, known in this case as "Clyde and Others v. Richmond & Danville Railroad Company." Previous to the filing of this bill, efforts had been made to formulate and adopt a plan of reorganization which would relieve the situation. But these having failed, and the discovery and adoption of a satisfactory plan of reorganization requiring considerable time, the aid of the court was sought by these creditors and stockholders, in order to give adequate protection to the corporation, from suits and otherwise, until a satisfactory financial reorganization could be effected. The bill was filed on the 15th day of June, 1892, and F. T. Huidekoper and Reuben Foster were appointed receivers. To this bill the mortgage creditors were not parties. The receivers administered the affairs of the system in their hands, from June 17, 1892, the date of their appointment, to July 31, 1893. They received from the corporation on their appointment \$480,427.91 in cash, and collected from accounts due prior to their appointment \$671,000. They received in gross earnings during this receivership \$11,669,789.50. The operating expenses, including taxes, were \$8,371,997.19. The net earnings were \$3,297,792.31. Out of this they paid large sums for construction on the main road, the Richmond & Danville, and for construction work on leased and owned lines, and for equipment. They also paid expenses incurred prior to the receivership, judgments against parts of the system, on rentals, dividends, car trusts, and interest on mortgage bonds. On 17th day of July, 1893, the Central Trust Company, a mortgage creditor of the Richmond & Danville Railroad, filed its bill for foreclosure of mortgage, and

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under that bill Samuel Spencer, F. W. Huidekoper, and Reuben Foster were appointed receivers, and were put in possession of the property theretofore in charge of the former receivers, who were finally discharged July 31, 1893. On their discharge they turned over to their successors in cash \$141,325.19. The Carnegie Steel Company, Limited, appellees here, filed a claim against the Richmond & Danville Railroad Company in each of these cases. The claim was first filed October 14, 1892, with the special masters appointed in the first-named case. After the foreclosure suit was filed, this company, on February 12, 1894, upon its petition, was permitted to intervene in that suit, both suits being then consolidated; and on March 1, 1894, it filed another petition, setting forth at large its claim. The Carnegie Steel Company, Limited, holds five notes of the Richmond & Danville Railroad Company, dated as follows: March 21, 1892; March 24, 1892; April 4, 1892; May 16, 1892,—each payable in three months from their dates, respectively; and one dated June 7, 1892, at four months. The total principal is \$125,067.39. The origin of these notes was as follows: On June 10, 1891, the Carnegie Steel Company made a contract with the railroad company to deliver certain steel rails on board cars at Bessemer, Pa., at \$30 gross per ton, payable in notes at four months from date of shipment, without interest, with the privilege of renewal of such notes for three months, with interest on renewal at 5 per cent. per annum, and with the further privilege of a second renewal, with interest at 6 per cent. per annum. The rails were all delivered at intervals between 25th of July, 1891, and 10th of October, in the same year, and notes given therefor. The notes, according to contract, were renewed, and did not mature until after the appointment of the receivers in the Clyde case. The Carnegie Steel Company sought payment of its claim as having an equity superior to that of the mortgage debt, under the principles governing this court in the administration of assets in the hands of railroad receivers, and also as entitled to a

preference under section 2485 of the Code of Virginia. The demand was made upon the purchaser, who, under the terms of the order of sale, is responsible therefor if the contention of the steel company is sustained. The circuit court sustained the claim, and gave the Carnegie Steel Company a decree for the principal sum thereof, with interest. Errors were assigned as to this action of the court, and the case has been heard on the assignments of error.

Henry Crawford and Willis B. Smith, for appellant.
N. P. Bond and B. H. Bristow, for appellee.

Before SIMONTON, Circuit Judge, and HUGHES and MORRIS, District Judges.

SIMONTON, Circuit Judge (after stating the facts). It is manifest that the two bills, that of Clyde and others, stockholders and creditors, and that of the Central Trust Company, a mortgage creditor, were intended to serve one purpose. Both looked to a satisfactory financial reorganization of the Richmond & Danville system. The first was filed to secure the protection of the court until such time as such financial reorganization could be perfected. The second was filed to carry out the financial reorganization which was then perfected. They can be treated as one proceeding, the one being the necessary consequence of and part of the other.

When the receivers were appointed in the second case, and were directed to take charge of the property theretofore in the hands of the receivers appointed in the first case, the court provided :

"Nothing in this order contained shall be construed to vacate any of the orders heretofore entered in the case of Wm. P. Clyde and others. But the court reserves full power to act upon the masters' reports filed in the said cause, and in said cause to adjudge and decree upon the rights of creditors asserting a claim against the property of the said railroad company, or income thereof, in preference to the mortgage debt

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thereof, by orders to be entered in the said suit of Wm. P. Clyde and others, upon notice to parties, with like effect upon the mortgage property and income as if the orders were entered in this cause."

When the Central Trust Company filed its bill, praying the appointment of receivers, it submitted its rights as mortgagee to these conditions. *New England R. Co. v. Carnegie Steel Co.*, 75 Fed. Rep. 59.

Fosdick v. Schall, 99 U. S. 235, and the long line of cases following it, elucidating and applying the principles there first laid down, have established this doctrine:

Priority of Supply Debts. Railroad property is a matter of public concern. The franchises necessary to their creation and operation involve, in great extent, the rights and interests of the public, and these rights and interests must be preserved. To do this, the railroad must be kept a going concern. In order to construct a railroad, two parties must concur,—the capitalists, who put in the money and the work, and the sovereign power, which contributes the franchises, especially that of eminent domain. Without the money and without these franchises the road cannot be built. The consideration which moves the sovereign to grant these franchises is the public use of the road when built,—that it remain of use, that it be and remain a going concern. To this end, the first application of its earnings must be made. The stockholders subscribe, and the bondholders lend their money, with knowledge of this. Neither of them can get anything until the current expenses are paid. Upon this assurance, all persons who furnish labor or supplies to a railroad corporation are encouraged to give it credit, and to contribute to keep it a going concern. If, through inadvertence, or by intention, or from any other cause, any portion of the earnings has been applied to interest or dividends, or to the permanent improvement of or addition to the property, leaving unpaid debts incurred for things necessary to keep it a going concern, this is a diversion which the court, while aiding the mortgage creditor, will first correct. *Fosdick v. Schall*, 99 U.

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S. 235; Miltenberger v. Railway Co., 106 U. S. 286, 12 Am. & Eng. R. Cas. 464; Trust Co. v. Souther, 107 U. S. 591, 11 Am. & Eng. R. Cas. 707; Burnham v. Bowen, 111 U. S. 776; Kneeland v. Machine Works, 140 U. S. 596, 48 Am. & Eng. R. Cas. 675; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 48 Fed. Rep. 188. And it makes no difference if the person furnishing supplies allows his claim to remain an open account, or prefers to close it with a note or acceptance giving extended credit; nor is it any waiver of the right to renew the paper at maturity. Burnham v. Bowen, 111 U. S. 776.

The rule is stated by WAITE, C. J., in Burnham v. Bowen, 111 U. S. 780, 781:

"Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income. Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of a mortgaged railroad, and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession; that is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the 'debts of the income' should be paid from the income, before it is applied in any way to the use of the mortgagees. The business of a railroad should be treated by a court of equity under such circumstances as a 'going concern,' not to be embarrassed by any unnecessary interference with the relations of those who are engaged in or affected by it. In the present case, as we have seen, the debt of Bowen was for current expenses, and payable out of current earnings. It does not appear from anything in the case that there was any other liability on account of current expenses unprovided for when the receiver took possession, and

there is nothing whatever to indicate that this debt would not have been paid at maturity from the earnings if the court had not interfered at the instance of the trustees for the protection of the mortgage creditors."

If this be the law when a receiver is appointed at the instance of mortgagees, how much stronger is the equity when the receiver is appointed at the instance of stockholders, to secure uninterrupted opportunity for a satisfactory reorganization? The question is as to the application of those principles to the case at bar. There can be no question that the steel rails furnished by the Carnegie Steel Company come within the class of supplies necessary to keep the railroad company a going concern; and the evidence establishes the fact that, after incurring the debt, the railroad company was in the receipt of large earnings, which were applied to permanent improvements, rentals, and interest on the mortgage debt; that the receivers, who, under the Clyde bill, took possession of the property, earned large income, which was applied in the same way, leaving this debt unpaid; and that, when these receivers were discharged, they showed in their accounts a cash surplus, which was duly paid over to their successors under the Central Trust Company bill. The original contract of purchase of the rails was on June 10, 1891. Deliveries were made under it between July 25 and October 10, 1891. The price was represented by notes, with privilege of renewal. This privilege was exercised. Before the notes matured, the Clyde bill was filed, and receivers appointed. The notes fell due. The exact dates are these: The receivers were appointed June 15, 1892. The first note matured June 24, the second June 27, the third July 7, the fourth August 19, the last September 10, 1892. The supplies were furnished between July and October, 1891,—the first of them nearly eleven months, the last a few days more than nine months, before the appointment of receivers in the Clyde case. In the cases in the supreme court and on circuit in which this consideration for the claims of supply creditors is discussed, it is called an "equity."

The only qualification in applying the equity when the facts call for its exercise is that the claim has arisen within a reasonable time before the receiver was appointed. No fixed definition of a reasonable time has been adopted.

In *Thomas v. Railway Co.*, 36 Fed. Rep. 817, six months was made the limit of a reasonable time. In *Miltenberger v. Railway Co.*, 106 U. S. 288, 12 Am. & Eng. R. Cas. 464, ninety days was the limit adopted. In *Burnham v. Bowen*, *supra*, the supplies were furnished some time in 1874 (when does not appear), and the receiver was appointed early in 1875. In *Bound v. Railway Co.*, 8 U. S. App. 472, eighteen months was considered too long a period. See, also, *Railroad Co. v. Lamont*, 32 U. S. App. 483.

MR. JUSTICE BREWER, whose ability and large experience on this subject give his opinions great weight, in *Blair v. Railway Co.*, 22 Fed. Rep. 474, says :

"The idea which underlies these principles I take to be this : That the management of a large business, like that of a railroad company, cannot be conducted on a cash basis. The temporary credit, in the nature of things, is indispensable. Its employees cannot be paid every month. It cannot settle with other roads its traffic balances at the close of every day. Time to adjust and settle these various matters is indispensable. Because, in the nature of things, this is so, such temporary credits must be taken as assented to by the mortgagees. * * * In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees, and such claims preferred. Now, for what time prior to the appointment of a receiver may these credits be sustained? There is no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claim settled and paid. Six months is the longest time I have noticed as yet given. Ordinarily, I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary."

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It is evident that, in determining what is a reasonable time, regard must be had to the special circumstances of each particular case. No hard and fast rule can be adopted, nor any line of demarkation clearly made. "What is a reasonable time is a question of law depending upon the circumstances of the particular case." *Paine v. Railroad Co.*, 118 U. S. 160, 25 Am. & Eng. R. Cas. 37; *Morgan v. U. S.*, 113 U. S. 477.

In the present case the Carnegie Company was dealing with the Richmond & Danville Company. This road controlled an enormous system of railroads, and was in the enjoyment of a very large revenue. There can be no doubt that, if the system had been continued, these rails could have been paid for out of the earnings. Demand for rails was constant; and it was to the highest interest of the railroad company to keep up its credit with the Carnegie Company. The system, however, had become too extended, and needed reorganization. Those interested in it as stockholders and owners attempted plans of reorganization, but did not get the unanimity necessary to perfect them. They sought the aid of the court, and asked its protection from creditors until such time as a scheme of reorganization could be completed and adopted. Their prayer was granted, and the receivers appointed. This whole action was for the advantage of those who owned or were interested in the property of the railroad company, for their advantage primarily and principally, if not for their advantage solely. But for this intervention in behalf of these stockholders and creditors, their taking the property out of the hands of the company, and sequestrating it for their own purposes, it must be presumed that the notes of the Carnegie Company would have been met at maturity. At the least, it can be said, in the language of *Burnham v. Bowen*, 111 U. S. 781, "There is nothing whatever to indicate that this debt would not have been paid at maturity from the earnings if the court had not interfered," at the instance of these stockholders. The mortgage creditor obtained the appointment of re-

ceivers in his bill on the express condition that the rights of creditors under the Clyde bill should be conserved. And, as that bill deprived the company of the power of receiving any further earnings, the court which appointed the receiver should require that to be done which "the company would have been bound to do if it had remained in possession; that is to say, pay out of what it received from earnings all the debts which, in equity and good conscience, considering the character of the business, are chargeable on the earnings."

Has the Carnegie Steel Company lost its claim by laches? In the transaction with the railroad company, the rails were to be paid for with notes, maturing at no long date. This was for the advantage of the railroad company, distributing the pay- Filing of Claim against Insolvent—Laches.ments, and making more easy the burden on the earnings. The paper was renewed according to the original contract of sale. This, as has been seen, is no waiver. Before the paper matured, the receivers took it out of the power of the company to meet the paper. As soon as it matured, the claim was made. The Carnegie Company did not sleep on its rights. It must be borne in mind that the Clyde bill was not the action of creditors of a corporation struggling to keep from bankruptcy, driven by creditors, after a long period of shaking credit. It was a plan adopted by the owners of the property to secure perfect reorganization, and avowedly to prevent creditors from disturbing inchoate plans to this end. The movement was conceived by the debtor company. They took their own time in applying to the court, and "the sudden action of the court left this debt unpaid." *Bound v. Railway Co.*, 8 U. S. App. 472. This case has been relied upon as settling a rule adverse to the claimant. In *Bound v. Railway Co.*, the Lackawanna Company furnished steel rails, and took notes therefor, 18 months before the appointment of a receiver. These notes were payable out of earnings by the terms of the notes. Three months after the date of the notes, and

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five months before their maturity, interest on the second mortgage bonds of the railway company was paid. No other diversion of income was proved or appeared in the case. By taking the notes at 8 months, the Lackawanna Company was held to have assented to the use of the earnings during this period for payment of interest. This defeated their claim.

The question can be considered from another standpoint. There can be no question that, notwithstanding the terms of the mortgage, the mortgagee cannot require an account of the earnings, tolls, and income from the mortgagor, until he has made demand therefor or for a surrender of possession under the provisions of the mortgage. *Sage v. Railroad Co.*, 125 U. S. 378, 35 Am. & Eng. R. Cas. 40, and cases quoted. When, therefore, the receivers appointed at the instance of stockholders and creditors took possession, they enjoyed the same right to the earnings and income which the railroad company enjoyed, and rightfully received them. As the railroad company would have been bound to use this income in the payment of the current expenses for labor and supplies, the receivers should have done so also. But, instead of this, receivers diverted the earnings, income, and funds in their hands towards the betterment of the property, permanent improvements, and additions to it, and in payment of interest. And this was natural. They were appointed to take possession of the property, and to conserve it until a plan of reorganization could be adopted and perfected. To facilitate this plan, the property must be kept up. To this end, the funds coming from earnings were used. When the purpose of the first receivership was accomplished, the mortgage creditors came in and reaped the benefit. Surely, those creditors whose claims were neglected, and from whom the earnings were diverted, have the right to ask and receive at the hands of the court the recognition and preservation of their claims. We see no error in the conclusion of the circuit court on this point. This renders unnecessary any discussion as to the force and effect of the Vir-

ginia statute. On that we express no opinion. The decree of that court is affirmed, with costs.

MORRIS, District Judge (concurring). If it be conceded that the claim of the Carnegie Steel Company has no statute lien superior to the mortgage of October 22, 1886, because the statute was passed after the date of the execution and recording of the mortgage, and that the debt, having been contracted more than six months before the appointment of the receivers, does not come within the rule which might permit it to be paid out of the proceeds of the corpus of the mortgaged railroad property, there still remains to be considered whether there is any other ground of equity which entitles the claim to payment out of any fund under the control of the court. If, after the appointment of the receivers under the creditors' bill, there came into their hands earnings which were expended for the betterment of the mortgaged property, instead of being applied to the payment of debts for current supplies contracted within a reasonable time before the receivership, then, as against the mortgage bondholders so benefited, the supply creditor has an equity to have those earnings restored and applied to his debt.

Diversion of Assets—Equity of Supply Creditor.

In *Burnham v. Bowen*, 111 U. S. 782, the supreme court said :

"We think the debt was a charge in equity on the continuing income, as well as that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership, and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick v. Schall*, 99 U. S. 252, the 'current debt fund,' as to make it proper to require the mortgagees to pay it back. But it is further insisted that even though the court did err in using the income of the receivership to pay the fixed prior charges on the mortgaged property,

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and thus increase the security of the bondholders, there is no power now to order a sale of the property in the hands of the trustees to pay back what had thus been diverted. In *Fosdick v. Schall*, Id. 254, it was said that if, in a decree of foreclosure, a sale is ordered to pay the mortgage debt, provision may be made for a restoration from the proceeds of sale of the fund which has been diverted, and this clearly because, in equity, the diversion created a charge on the property for whose benefit it had been made."

The facts of the present case suggest even a stronger equity in favor of the intervener than existed in the case of *Burnham v. Bowen*. The original bill filed by Clyde and others, who were creditors and stockholders, was professedly for the purpose of protecting the Richmond & Danville Railroad Company and its system, comprising 26 other railroads, in 6 different states, from disruption from the efforts of creditors to enforce their debts. The court was asked to preserve its unity, and to prevent the ruinous sacrifice which would result from a severance of the system. The trustee of the foreclosed mortgage was not made a party, but within a few days after the filing of the bill the trustee was notified of applications for authority to use the income to pay maturing car-trust installments and rental obligations, and was represented by counsel, and did not object; and two months later the trustee was, on its own motion, made a party to the case. One year later, the trustee filed its bill to foreclose the mortgage of October 22, 1886, under which the sale was decreed. This mortgage covered, not only the Richmond and Danville Railroad proper, as to which it was a third mortgage, but also the interest of the Richmond & Danville Railroad Company in some 20 other railroad lines. These interests, consisting of leases, contracts for operating, and mortgage bonds, were part of the property sold under the decree of foreclosure. In the prayer for relief in the bill for foreclosure, the court is asked to appoint receivers, with power to operate the Richmond & Danville Rail-

road and "the railroads owned and leased or controlled by it, and with all such power as may be requisite to preserve said property until sale thereof." It is obvious that the preservation of the unity of the system of railroads which was operated by the Richmond & Danville Railroad Company, without any disruption of the system, was part of the relief prayed by the mortgagee's bill, as it had been by the original creditors' bill with which it was presently consolidated. How was the system to be preserved from disruption, and brought to a sale as a unit, except by using the current earnings of the receivers to pay the rentals and contract obligations necessary to prevent forfeitures of the leased and controlled railroads, and the payment of the prior fixed charges of the Richmond & Danville Railroad proper?

On the appointment of the Clyde receivers, June 16, 1892, there was paid over to them the cash then in the treasury of the corporation, amounting to \$480,427.91; and they received sums earned prior to their appointment amounting to \$671,363.40. These two sums, amounting to \$1,151,791.31, very nearly paid all the current operating debts contracted within six months, which, by order of court, they were directed to pay. The deficit did not amount to as much as \$100,000. From June 17, 1892, to July 31, 1893, at which latter date the Clyde receivers were discharged and the mortgagee's receivers took possession, the Clyde receivers had received:

Gross earnings.....	\$11,669,789 50
Operating expenses, including taxes	8,371,997 19
Net earnings.....	\$ 3,297,792 31

Out of this large sum they expended, under orders of court, about \$500,000 for construction and equipment. They made car trusts payments amounting to over \$200,000, and the remaining two and a half millions they paid away for interest, rentals, and dividends, including about \$400,000 for interest on the two prior Richmond & Danville mortgages. These payments of interest, rentals, and dividends on the roads operated

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by the Richmond & Danville Railroad Company were in very large part on those covered by the foreclosed mortgage, and were paid to prevent forfeitures and preserve the unity of the system. They were made upon orders of court, passed without objection, after notice to the trustee of the bondholders.

The Clyde receivers, when they were discharged, handed over to the new receivers appointed under the mortgagee's bill, in cash, \$141,325.19, and supplies and materials purchased by them to a large amount. It is urged that there were no net earnings, because on the whole operation of the system there was a deficit; but the fact is that there was a gain of \$346,163.10 from the operation of the Richmond & Danville Railroad proper, and the deficit resulted from the operation of other lines of the system which were covered by the mortgage, and which were held and operated by the receivers, and kept from forfeiture, primarily to preserve the security of the foreclosed mortgage. This was also the policy of the receivers appointed at the instance of the mortgagees, who operated the system from August 1, 1893, to July 1, 1894, pursuing precisely the same policy as the Clyde receivers. The Clyde bill was not a mortgagee's bill, but was filed by the stockholders and creditors, with the assent of the corporation, to preserve the system until its financial difficulties could be adjusted. When receivers are appointed under such a bill, it would seem to be peculiarly a case in which the court should use the income of the receivership in the way in which the corporation itself would have been bound to use it; that is to say, to pay current supply debts contracted within a reasonable time in preference to new construction and equipment expenses, and even in preference to expenditures to prevent forfeitures of subordinate lines. *New England R. Co. v. Carnegie Steel Co.*, 75 Fed. Rep. 54; *Scott v. Trust Co.*, 32 U. S. App. 468-480.

The pleadings in both the Clyde case and the mortgagee's case, from the beginning to the end, disclose that the proceedings in court were in aid of the under-

taking to adjust the complex financial burdens of the Richmond & Danville system, comprising over 3,000 miles of railroads. It further appears that the reorganization was effected through the sale under the foreclosed mortgage to the Southern Railway Company, and that, in the reorganization, the bondholders under the foreclosed mortgage were secured by a new mortgage on the whole system. It is a case, therefore, which does not suggest harsh treatment of the Richmond & Danville supply creditors in the interest of the bondholders of the foreclosed mortgage. This appeal does not raise the question of a supply creditor seeking to be paid out of the corpus of a mortgaged property, and who is compelled, before he is allowed to displace a prior recorded mortgage, to bring himself strictly within the limitations to that equity; but this is a supply creditor seeking to be paid out of the earnings which came to the receivers after his debt matured, and which were diverted by them, without opposition from the mortgagee, to expenditures which directly resulted in preserving the mortgaged property, which earnings, if the receivers had not been appointed, there is no ground for supposing would not have been applied by the company to the payment of the supply creditors' debt.

The case of *Bound v. Railway Co.*, 7 C. C. A. 322, was from the beginning a bondholders' foreclosure suit. There was no proof of earnings by the receiver diverted from supply creditors. It was an effort by an intervening supply creditor, who had furnished rails 18 months before the receiver was appointed, to obtain priority over the mortgage, and be paid out of the proceeds of a sale of the corpus of the railroad. The ruling in that case was that the claim was, in point of time, beyond the limit to which supply creditors who might claim to be paid in preference to mortgage bondholders must be restricted, and that, as to the diversion of earnings prior to the receivership, the creditor had waived it by his agreement, at the time of the purchase, to give credit and take notes, postponing pay-

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ment of its claim beyond the due day of the mortgage interest paid.

In the present case we think that earnings of the receivers under the Clyde bill are shown to have been used for the benefit of the bondholders which should have been applied to the payment of the Carnegie Steel Company's supply claim, and that, under the terms of the decree of foreclosure, the purchaser was rightly required by the circuit court to pay the claim. But I do not think interest should be allowed. *Thomas v. Car Co.*, 149 U. S. 95-116. The delay has not been the fault of either the bondholders or the purchaser.

*ERSLEW et ux.**v.**NEW ORLEANS & N. E. R. Co. et al.**(Supreme Court of Louisiana, Dec. 14, 1896.)*

Street Railways—Construction of Line—Negligence.—It is negligence on the part of an electric street-car company, in the construction and establishment of its plant, to so place one of its guy wires over the track of a steam-railway company as not to afford sufficient space for the latter's trains to easily and conveniently pass, without risk of danger and injury to its servants and employees.

Danger to Employees—Negligence.—It is negligence on the part of the steam-railway company to permit an electric street-car company to so construct and maintain over its tracks a guy wire that it will endanger the lives of its servants and employees.

Assumption of Risk.—If an employee of the steam-railway company knew or ought reasonably to have known the precise danger to him of the guy wire of the electric street-car company, in the course of his employment, and saw fit, notwithstanding, to continue in it, he might be held to have assumed the extraordinary risk, as well as the ordinary risks, of his service. But this consequence must rest upon positive knowledge or reasonable means of positive knowledge of the precise danger assumed.

(Syllabus by the Court.)

APPEAL from parish of Orleans civil district court.
Modified.

Erslew v. New Orleans, &c., R. Co.

Harry H. Hall, for appellant New Orleans & N. E. R. Co.

Denègre, Blair & Denègre, for appellants New Orleans Traction Co., Limited, and New Orleans City & Lake R. Co.

Benjamin Rice Foreman, for appellees.

WATKINS, J. This action is for the sum of \$20,000 damages brought by the plaintiffs, for the reparation of the injuries suffered and inherited by them in the death of their son, through the fault, negligence, and want of due care on the part of these defendants; their claims being made against the three defendants *in solido*. The cause having been submitted to and tried by the judge, there was a decree rendered in favor of the plaintiffs, and against the defendants, *in solido*, for the sum of \$5,000; and the latter have appealed, the plaintiffs having answered the appeal, and prayed for the amount of the judgment to be raised to the full sum demanded in their petition.

For the purpose of being exact, and correctly stating the issues, we have extracted from the brief of counsel for the New Orleans & Northeastern Railroad Company the following summary of the pleadings, *viz.*: "The petition avers: Petitioners are informed and believe, and so aver, that the New Orleans City and Lake Railroad Company owns the franchise, track, and equipment of the electric line of street cars usually known as the 'Levee and Barracks Line,' running along Levee street and Enghien street and other public streets and highways in New Orleans; and it and the Traction Company (aforesaid) have a common management and control, and jointly operate said line, and have a joint interest therein; and the Traction Company, with the consent and under the direction of the said New Orleans City & Lake Railroad Company, negligently and unskillfully put up and erected a guy wire across the public street and public levee, and across the tracks of a steam-railroad company, lawfully laid along the public levee, and along Levee street, a public street and highway, at the foot or intersection of Enghien street

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with the levee and Levee street, so close to the ground as to obstruct the free passage of cars and vehicles with high loads, and so close to the ground as to be dangerous to the life of brakemen on freight cars passing under it. The said steam-railroad track had been there on the public highway, and was itself a public highway, for a long number of years; and it was negligence to place a strong guy wire across the said highway and track where large freight cars, loaded with furniture and bulky articles were well known to be constantly passing, and so close to the ground as to be a constant source of danger to brakemen, who, in the discharge of their duties, are obliged to be on the top of the cars. The New Orleans & Northeastern Railroad Company is liable, because it was its duty to its employees and all others in like situation to prevent the said wire being stretched in a dangerous position over its track, and to compel its immediate removal. The wire had been there a sufficient time for the said railroad company to compel its removal; and it was negligence in said company to run freight cars under said wire, with brakemen on top of said cars. The said Traction Company is liable, because it placed the wire across the public highway in so dangerous a manner, and is interested and joins in the operation and use of the line of electric railway of which the said guy wire is a part. And the New Orleans City and Lake Railroad Company is liable because it owns the said franchise and line, aforesaid, and procured the Traction Company to erect it, as its agent. The servants and agents of the defendant were warned of the dangers of the guy wire, several weeks before it resulted in the death of petitioner's son, who, on or about 18th February, 1896, was in the performance of his duties as brakeman on a freight car of the New Orleans & Northeastern Railroad Company, and in its service, which was being propelled rapidly along Levee street, when, just as he arose from his brake, his head struck this guy wire above described, and knocked him off the car; and he was horribly mangled, and, after suffering

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great pain of body and mind, he died. He contributed to the support of his parents, and they had a legal right to be supported by him. He was a steady, faithful, industrious boy, or young man. For his suffering, pain, and agony of body and mind, petitioners claim fourteen hundred dollars (\$1,400); for funeral expenses, one hundred (\$100) dollars; for their own loss of the comfort and support of their son, eighteen thousand five hundred (\$18,500) dollars." The answer of the N. O. & N. E. R. Co. is as follows: "And now into court comes, by its president, C. C. Harvey, the N. O. & N. E. R. Co., made one of the defendants herein, and, for answer to the plaintiff's petition, denies all and singular the allegations thereof, except in so far as may be hereinafter admitted. It admits that Ernest Erslew, on or about the time stated in plaintiff's petition, lost his life by falling from a train of freight cars being operated by this respondent, and which cars passed over the said Erslew, thereby killing him. But your respondent specially denies that said accident and resulting death was caused in any manner by its fault, unskillfulness, or negligence, or that of its servants or employees. And, further specially answering, respondent avers that the guy wire referred to in plaintiff's petition was perfectly visible; that said Ernest Lewis Erslew knew of its location, and had been frequently warned in respect thereto; that he knew of the danger due to the location of said wire both actually and presumptively, by reason of the patent and visible nature of the risk; that he had been frequently warned, not only concerning the location of said wire, but of the danger to which said location exposed him and others; that he had many times, both on the day that he lost his life and many days prior thereto, frequently passed under said wire; that said wire and its location came within the risk assumed by him in virtue of his employment; and that he contributed to the injuries resulting in his death by his own negligence and imprudence."

The following is a brief summary of the points made

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and relied upon by the Traction Company and the City & Lake Railroad Company, as the following extracts from their counsel's printed argument will show, *viz.*: "(1) General state of the case: To justify a judgment for plaintiff in this case, two things must concur,—negligence on the part of defendant causing the accident; absence of negligence on the part of the deceased contributing to the accident. No matter how gross the fault or negligence of defendants, plaintiff cannot recover if the evidence shows that the accident could have been avoided by the exercise of ordinary care and attention by the deceased, or if the evidence shows that the accident was due, in any degree, to heedlessness or inattention on the part of the deceased. These defendants mainly rely upon the fact, established by the uncontradicted evidence, that the deplorable death of young Erslew was due, in part, to his inattention to a danger which was patent and visible; to his forgetfulness of a danger with which he was familiar, and of which he knew and had been warned,—a danger he could have easily escaped had he not been inattentive and forgetful. This defense is wholly independent of the fault or negligence charged against these defendants. It would suffice to defeat recovery, though we admitted, or the court found to have been established, every fault or negligence which plaintiff has charged us with. The case is a very simple one. There is little or no conflict of evidence, and little or no room for controversy over the law applicable thereto. In September or October, 1895, the New Orleans Traction Company, Limited, one of the defendants, strung a guy wire across some railroad tracks on the levee. The height of this wire was such that a man standing on the top of certain kinds of freight cars, in frequent use on the Northeastern Railroad, would have to duck his head in order to avoid being knocked off the car. This wire was a half inch in diameter, and was plainly visible for some distance. One of the plaintiff's witnesses said that it could be plainly seen nearly a hundred yards off. All of his witnesses saw it plainly at the time of the ac-

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cident, while standing across the street, a considerable distance off. The accident occurred in February, 1896. During the whole period of the existence of the wire across the Northeastern track, plaintiffs' son had been in the employ of the Northeastern Railroad Company. His duties required him to stand on the top of cars, and to pass daily under the wire. He knew of the location of the wire, and was familiar with the necessity and means of avoiding it by ducking his head, not only because it was patent and visible, but because he had been specially warned and cautioned in respect thereto. The uncontradicted testimony of two train-crew foremen, under whom the deceased had worked at different times, established that his attention had been called to the danger of the wire, and that he had been warned in respect thereto. The danger was obvious. The means of avoiding were also obvious, and easy to observe."

To epitomize, plaintiffs' theory is that the Traction Company and City & Lake Railroad Company, being under joint management and control in the construction and operation of the lines of street railway in the city of New Orleans known as the "Levee and Barracks," among others, which extends along Levee and Enghien streets, and other public highways of said city, negligently and unskillfully put up and erected a guy wire across the tracks of the Northeastern Railroad Company, which had been theretofore laid along the public levee, and adjacent to Levee street, at the foot of Enghien street, "so close to the ground as to be dangerous to the lives of brakemen on freight cars passing under it;" that it was negligence to place such a guy wire across the said highway and track where large freight cars were well known to be constantly passing, and so close to the ground as to be a constant source of danger to brakemen, who, in the discharge of their duties, are obliged to be on the top of the cars"; that it was negligence on the part of the Northeastern Railroad Company, and it is liable, because it did not prevent the construction of a guy wire so situated and in such a dangerous position over its track, and, fur-

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ther, because it did not compel the Traction Company and the City & Lake Railroad Company to remove this dangerous obstruction; that, knowing of the construction and maintenance of this dangerous obstruction, it was negligence on the part of the Northeastern Railroad Company to run its freight trains under it, constantly and customarily, to the imminent danger and peril of the lives of its brakemen, whose duties required them to remain upon the roofs of said cars; that, at the time of the accident which caused the death of their son, he was engaged in the performance of his duties as brakeman on one of the freight cars of the Northeastern Railroad Company, and in its service while it was being propelled rapidly along the track, when, his head coming in contact with said guy wire, he was knocked off, felled to the ground, and killed. The common defense of all the defendants is want of fault and negligence on their part, and contributory negligence on the part of plaintiffs' son, in that the guy wire was easily and plainly visible, and could have been readily seen and avoided by plaintiffs' son had he paid proper attention, and that he had been frequently advised of the danger, and warned against it; and that he had frequently passed under this wire while engaged in the daily performance of his duties as brakeman, and thus assumed the risk of danger therefrom, as an incident to his employment,—in other words, that the plaintiffs' son was guilty of contributory negligence by reason of his inattention to or forgetfulness of a danger incident to his employment, and which he might have avoided by the exercise of due care and attention.

The facts are few and simple, and in the main the witnesses agree. A fair summary of them is as follows, *viz.*: That the accident happened on the 18th of February, 1896, while young Erslew was standing on the roof of what is designated in the evidence as a "California fruit car," from the Southern Pacific Railroad, as it was attached to a train of freight cars which was passing on the track of the Northeastern Railroad

Company, when he was struck by an overhead wire of the New Orleans Traction Company and City & Lake Railroad Company, felled to the ground, and killed almost instantly. The accident was witnessed by two or three persons who were on the sidewalk near by at the time, and whose testimony is in the record. They agree in the statement that it occurred in the morning, at 7:25 o'clock, and that young Erslew "partly turned his head, his back [being] towards the river, so the wire [caught] him, and [he] went down between the cars"; that is to say, between the first and second cars in the train. His position was "on the rear end of the first car" when the accident happened; and his face was towards the woods, though slightly averted, and his back towards the levee; thus being in a station at right angles with the course of the train, which at the time was going south, the railroad track running at this point almost parallel with the levee on the Mississippi river, and between it and the Levee and Barracks Street Railway track. The overhead wire "struck him right above the shoulder, under the neck." At the time of the accident, young Erslew was in the employment of the Northeastern Railroad Company as a switchman and brakeman, whose duty it was to couple cars, and while thus engaged, to work on the roofs of cars as well as below.

A very clear statement is made by one of the Northeastern Railroad Company's employees, the switch foreman, or foreman of the switch gang or crew. In substance, he says that he was in charge of the train on which young Erslew was on the day of the accident, as foreman of the crew; that young Erslew's duty was to obey signals given him by the engineer. He was the only man the engineer could see; and, for that reason, he was stationed on the head of the train. Erslew occupied such a position as would enable him to see the foreman in the rear, on the ground, at the same time. It was Erslew's business to watch both the engineer and foreman, and catch their signals, and to signal to each one of them in return. The following excerpt

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from this witness' interrogation gives a clear view of the situation. "Q. What was he [young Erslew] doing on the day he was killed? A. Obeying signals. I instructed him to get on the head car. He was working with engine 219, and the engineer on the lower end of the yard was working engine 201; and I told him to get on the top of the fruit car, so he could give us the signals from the rear end. We were pulling out from track 9, to go on track 10, to pick up a caboose." On being asked if he (witness) knew of the guy wire which caused Erslew's death, he answered in the affirmative. Same witness repeats this statement, and says that the guy wire "would not clear a man standing on a high car; but, if a man was standing on an ordinary freight car, it would clear him." On being asked what he would do when he passed under this guy wire, he answered that he "stooped sometimes. If he was standing on a high car, he would have to stoop." This witness says that young Erslew had been in this "service of the company about five or six days before this accident happened," and that he notified him about the guy wire about that time; that he told him to "look out for the wire at Enghien street and the levee; that it was too low, and would not clear a man standing on the top of the car," and that he told him that he (witness) "had to stoop several times to keep from getting knocked off the cars"; that after this notification, young Erslew had occasion to pass under that wire frequently, sometimes as often as 8 or 10 times a day. This witness states that the car young Erslew was on was "a very high car, the highest that is used"; and other evidence in the record establishes the fact that it was a California fruit car, of very large dimensions, and much higher than the ordinary freight car is; that it measured 13 feet $5\frac{1}{4}$ inches from the top to the railroad track. This witness says: "That is what is called an 'average height' of the fruit car; but that the ordinary box car runs from eleven (11) feet six (6) inches up to this height;" that, "taking box cars as they run, [they are] about twelve feet,"—that is to

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say, 18 inches lower than California fruit cars are. The guy wire was attached, at one end, to an iron post planted in the levee of 6 feet in height, and it extended to a post on the levee side of Enghien street which was 21 feet in height, passing over the track of the Northeastern Railroad Company at a height of 18 feet 3 inches. It thus appears that, from these estimates, there was an intervening space of a little more than 6 feet between this guy wire and the ordinary box car; and between it and the average fruit car of only 4 feet and 10 inches. Manifestly, then, this wire was so constructed as to pass box cars of the average height of 12 feet, and leave a space between sufficiently great to clear a man standing on the roof, of 6 feet in height, but not so as to clear a man of only 5 feet in height, standing on the roof of a fruit car..

Applying these estimates (and they were made by an employee of the Northeastern Railroad Company, and not disavowed by either of the other defendants making common cause) to the preceding statements of the witnesses, it seems clear that the blame is fairly placed upon the defendants, and that young Erslew in no manner contributed to the accident. At the time of the occurrence, he was standing on the roof of the forward car of a freight train while it was in motion, and at the rear end, where the foreman of the switch crew had assigned him a position, so that he could give the signals to the engineer, as well as to him. At the time of the accident, the witness occupied a position on the ground near by, and the train was being "pulled out from track 9 to go on track 10, to pick up a caboose," when the guy wire "struck Erslew right above the shoulders, under the neck." Evidently, the accident would not have happened if young Erslew had been upon an ordinary freight car; and there is no evidence that he had, during his brief period of employment of six days, ever been called upon to occupy a fruit car, or that he was advised or knew of the difference of the height of the cars. Though many of the witnesses were interrogated on the point, there was no one who.

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stated that Erslew had ever had occasion to stoop down in order to avoid the guy wire, as the foreman had done.

From all the evidence, it is evident that the Traction Company and the City & Lake Railroad Company, in the first instance, erected the guy wire at least 18 inches lower than it should have been in order that fruit cars of average height could be passed beneath it with safety

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to the operators and employees of the Northeastern Railroad Company, and they were consequently negligent; and that permitting this guy wire to be thus erected over its track, and subsequently maintained, to the great danger of its employees, was negligence on the part of the Northeastern Railroad Company. The attention of the servants and agents of the Traction Company was attracted to the improper height of the guy wire at the time of its erection; and full knowledge of this defect, and the danger it threatened to its employees, was repeatedly brought home to the Northeastern Railroad Company, through the subaltern officers of the corporation to whom the management of its trains is intrusted, and by whom the employees and operatives are governed and directed. This knowledge is fully disclosed by the testimony of the defendants' witnesses and their employees. Notwithstanding this guy wire may have been visible, and young Erslew had been warned of its existence and dangerous character, there is nothing to show that he had, on any occasion, to stoop down in order to avoid it, and for that reason was not aware of that necessity; but, on the contrary, having had occasion frequently to pass under the wire while engaged in his daily avocation on the roofs of ordinary box cars, without the necessity of stooping, the evident inference is that he did not deem it necessary. It cannot be said, in view of these facts, that the accident was due, in any part, to forgetfulness or inattention to a known danger, which might have been avoided by the exercise of due care and proper caution on the part of the deceased. Having entered this service only a few days before the

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accident is a circumstance strongly corroborative of this theory.

Forgetfulness of a known danger is treated by some authors and courts as contributory negligence, but it will be necessary to produce and analyze the authorities in order to ascertain their applicability to the instant case. The effect of voluntary ^{Assumption of Risk.} exposure to danger is thus stated by Beach, Contrib. Neg. § 37: "While it is unquestionably true that one may voluntarily and unnecessarily expose himself, or his property, to danger without thereby becoming guilty of contributory negligence as matter of law, it is, nevertheless, an established rule that, where one does knowingly put himself or his property in danger, there is a presumption that he, *ipso facto*, assumes all the risks reasonably to be apprehended from such a course of conduct, as where one goes voluntarily upon a railway track, without keeping watch, at a point where it is known to be especially dangerous, or ventures upon a bridge, track, or highway which he knows to be defective or unsafe. And where one, knowing the danger, temporarily forgets it, and in consequence suffers, his forgetfulness will not avail him as an excuse. What he knows, he must remember at his peril; and not to remember is contributory negligence, if it occasions injury." And, in affirmance of the principles announced by Mr. Beach, we have made the following selections from the brief of the counsel for the Traction Company and the City & Lake Railroad Company, *viz.*: "So, in the case of Walker v. Town of Reidsville, 96 N. Car. 382, where plaintiff was suing to recover damages from falling into an open pit near a highway which had been negligently left without guard or rail, it was proved that plaintiff knew of the existence of the pit, but had forgotten it at the time. The court said: 'A reasonably prudent and careful man would not forget the presence of such a danger in his immediate neighborhood,—one he had seen and observed every day for more than a fortnight, and but a few hours before he received the hurt. He was bound to act upon

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his information, and to use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it. He forgot and failed to be careful at his peril, and in his own wrong.'” In the conspicuous case of *Butterfield v. Forrester*, 11 East 60, LORD ELLENBOROUGH said: “A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary care to be in the right. * * * One person being in fault will not dispense with another’s using ordinary care for himself. Two things must concur to support this action,—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.” Again: “Applying the foregoing principles to overhead structures, it is said in 3 Wood, R. R. p. 1747, § 379: ‘But where the servant knows, or ought to know, of the obstruction, he cannot recover for an injury received therefrom, because, by reason of his failure to guard against it, and neglecting to do so, he is treated as being guilty of contributory negligence.’” The following is the entire syllabus or headnote of the case of *Williams v. Railroad Co.*, 116 N. Y. 628; 41 Am. & Eng. R. Cas. 254. It correctly states the facts and conclusions of the court: “In an action by a brakeman against a railroad company for personal injuries received by being struck by a bridge while standing on the roof of a freight car while engaged in his work, it appears from the plaintiff’s evidence that the bridge was too low for him to pass under while standing upright; that he was familiar with the bridge, and was standing with his back to the engine when he knew that the train was about to pass under the bridge. *Held*, that, the plaintiff’s testimony showing contributory negligence, defendant’s motion for a nonsuit should have been granted.” In *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. 226, the conclusion of the court is thus stated, *viz.*: “Decisions in accord with those cited are multitudinous, and the able counsel for plaintiff has adduced none to the contrary

They are too well grounded to be overruled, save by legislative power. When the hazards incident to the duties of the employee are open before his eyes, meet him every day of his services, and would knock him down if he did not stoop to avoid them, and he continues in the service without promise of amendment, clearly he accepts the risks of the situation. It is no matter whether danger signals are on other roads, for he was not deceived as to the degree of danger he incurred." Again: "In *Rains v. Railroad Co.*, 71 Mo. 164, the headnotes correctly state the facts and the conclusion of the court, as follows: 'A railway company is not bound to see that a footbridge crossing the line is at a height sufficient to enable brakemen to pass under it safely while standing upright on the top of freight cars; and if a brakeman is thus killed while in this position, being familiar with the situation and the danger, his own negligence contributes to his death, and there can be no recovery.' " To the same effect is the case of *Railroad Co. v. Stricker*, 51 Md. 47, where it was held: "A conductor of a railroad train, while standing on the top of a car in motion, in discharge of his duty, was injured by being brought in contact with a low bridge. He had been well acquainted with its position and character, and accustomed to pass under it. *Held*, that the company were not liable in damages." In *City of Vicksburg v. Hennessy*, 54 Miss. 391, the court declared: "The universal rule in this class of cases is that the injury must proceed wholly and solely from the defective highway; that the plaintiff must be entirely free from any negligence which contributed to the result; and that the burden of showing affirmatively that he exercised, at least, ordinary care and prudence, is upon him. Unless he establishes this, he must fail, notwithstanding he has shown the greatest remissness on the part of the corporate authorities." In *Wilson v. City of Charlestown*, 8 Allen (Mass.) 137, it was held that "a person who voluntarily attempted to pass over a sidewalk which he knew to be very dangerous by reason of ice upon it, which he might easily have avoided,

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could not maintain an action against the town, which was bound to keep the way in repair, to recover judgment for injuries sustained by falling upon the ice. *

* * While the proper degree of care is required from the county, so, on the other hand, at least ordinary care is required from the traveller. He cannot shut his eyes against apparent dangers, and drive recklessly along the highway. He is bound to keep his eyes open, and maintain a proper degree of watchfulness against danger. *Hubbard v. City of Concord*, 35 N. H. 52. *

* * In an action against a town or county for injuries resulting from defects in the highway, it is generally a good defense to show that the plaintiff was himself guilty of contributory negligence."

Giving to the foregoing opinions the widest scope and possible applicability, they proceed upon the principle that the injured party had knowledge of the obstacle or defect, and, by the exercise of due care and caution, he could have avoided it. Of course, that is true in a limited sense, and the rule applies to one who is "familiar with the situation and the danger," and negligently fails to avoid it; but it cannot be assumed, under the facts of this case, that the deceased was possessed of sufficient knowledge of the danger, to justify the presumption that he undertook all the risks reasonably to be apprehended. But the correctness of the doctrine announced in the foregoing authorities has been seriously questioned by courts of great ability. In the recent case of *Simonds v. City of Baraboo*, 67 N. W. Rep. 40, the Wisconsin court said: "Beach lays down the rule (section 12), in effect, that where one knows the danger, but temporarily forgets it, and, in consequence, suffers an injury, his forgetfulness will not avail him as an excuse; that what he knows he must remember at his peril; and that a failure to remember constitutes contributory negligence, if it occasion injury. But this opinion is not supported by reputable authorities anywhere, and has been expressly repudiated by this court. *Wheeler v. Town of Westport*, 30 Wis. 392." The doctrine announced by Mr.

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Beach is mainly grounded on an opinion of the Massachusetts court in *Gilman v. Inhabitants of Deerfield*, 15 Gray, (Mass.) 577; but the Wisconsin court said in *Wheeler v. Town of Westport*, *supra*, that that court had "carried the doctrine of forgetfulness" too far. And the court proceeded to say in the *Simonds Case*: "In fact, the rule of *Gilman v. Inhabitants of Deerfield* has been so fenced in by subsequent decisions as to be practically overruled,"—citing *Smith v. City of Lowell*, 6 Allen, 39; *Whittaker v. Inhabitants of West Boylston*, 97 Mass. 273; *Blood v. Inhabitants of Tyngsborough*, 103 Mass. 509; *Brigham v. Worcester Co.*, 147 Mass. 446; *Weed v. Village of Ballston Spa*, 76 N. Y. 329; *Bassett v. Fish*, 75 N. Y. 303; *Driscoll v. Mayor, etc.*, 11 Hun, 101; *Dorsey v. Construction Co.*, 42 Wis. 583; *Cuthbert v. Appleton*, 24 Wis. 383. To these cases may be added the following, *viz.*: *Alcorn v. Railroad Co.*, 108 Mo. 81; *Snow v. Railroad Co.*, 8 Allen, 441; *Plank v. Railroad Co.*, 60 N. Y. 607. In *Gardner v. Railroad Co.*, 150 U. S. 349, 59 Am. & Eng. R. Cas. 236, the supreme court cited and approved the opinion expressed by the Massachusetts court in *Snow v. Railroad Co.*, 8 Allen, 441, and said: "The supreme judicial court of Massachusetts held that the defendant was not relieved of its liability to the plaintiff by reason of any relation which subsisted between him and it at the time of the accident arising out of the employment in which he was engaged. because, among other reasons, it did not appear that the defect in the road was the result of any such negligence in the servant as to excuse the defendant, but was caused by a want of repair in the superstructure between the tracks of defendant's road, which defendant was bound to keep in a suitable and safe condition, so that plaintiff could pass over it without incurring the risk of injury." And the court then said: "We regarded this doctrine as so well settled that in *Railway Co. v. Cox*, 145 U. S. 593, 60 Am. & Eng. R. Cas. 469, we contented ourselves, without discussion, with a reference to some of the cases in this court upon the subject." In *Whittaker v. Inhabitants*

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of West Boylston, 97 Mass. 273, it was held that "the fact that a person injured by reason of a defect in a highway had previous knowledge of the defect is not conclusive evidence that he was wanting in due care at the time of the accident." In *Weed v. Village of Ballston Spa*, 76 N. Y. 329, the court said: "The defense that there was contributory negligence on the part of plaintiff rests mainly upon the fact that the plaintiff was familiar with the street, and, on several occasions before the accident, had seen the excavation; and the argument is that he ought to have avoided driving into it. But we think the question of the plaintiff's negligence was one of fact, and the finding of the referee thereon cannot be disturbed. In general, a person traveling upon a highway is justified in assuming that it is safe. The plaintiff, although he had known of the excavation might not remember its exact location, or the fact may have been forgotten." And, upon an examination and due consideration of the whole case, the court held: "Under the circumstances, the defendant was properly chargeable with notice of the existence of the excavation, and with negligence in not abating the nuisance, or so guarding the excavation as to prevent the accident to persons using the street."

But, with regard to the obligation of due care and caution, less strictness in their observance is imposed upon an employee than on a mere stranger sustaining no contract relations to the person or corporation inflicting an injury. But the important question as to the amount and character of knowledge an employee of a corporation must possess of the existence of a dangerous structure to constitute contributory negligence, as a question of fact, was settled in *Dorsey v. Construction Co.*, 42 Wis. 583, in which the court says: "If he knew, or ought reasonably to have known, the precise danger to him, in the course of his employment, of the cattle chute in question, and saw fit, notwithstanding, to continue in his employment, he might be held to have assumed the extraordinary risk, as well as the ordinary risks, of his service. The authorities cited

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by learned counsel for the appellant all agree in the general proposition. But it appears to us that this consequence of acquiescence ought to rest upon positive knowledge, or reasonable means of positive knowledge, of the precise danger assumed; not on vague surmises of the possibility of danger." Again: "And it appears to us very doubtful whether persons operating trains, and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track. And, even with actual notice of the dangerous proximity of adjacent objects, it may well be doubted whether it would be reasonable to expect them, while engaged in their duties, to retain constantly in their minds an accurate profile of the route of their employment, and of collateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relation of the train to adjacent objects. In the case of objects so near the track as to be possibly dangerous, such a course might well divert their attention from their duty on the train, to their own safety in performing it." That was the case of an employee of the defendant being injured by being carried against a cattle chute while, in the course of his employment, he "was ascending by a side ladder to the top of a freight car in motion"; the charge being "that the cattle chute was negligently, unskillfully, and improperly constructed so near the defendant's track as to endanger the persons and lives of the defendant's employees operating freight trains over its road at that place." The jury found a verdict in favor of the plaintiff for \$5,000 for the personal injuries he received, and the supreme court affirmed it.

The foregoing principles have been fully and well stated by this court in *Myhan v. Power Co.*, 41 La. Ann. 964, thus: "Based on sound reason and sheer justice, the law as expounded by jurisprudence is clear, that it is not contributory negligence to engage in a dangerous occupation: * * * that the risk assumed by

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the servant is the ordinary hazard incident to the employment, and this is synonymous with unavoidable accident; * * * that, unless the act is necessarily and inevitably dangerous, no negligence can be imputed; that the servant has a right to rely on the care and the superior knowledge, information, and judgment of the employer, and to act upon the presumption that the latter would not expose him to unnecessary risk, and has taken all necessary precautions; that the employee is not bound to inquire as to latent, but only patent, defects; and that he has the right to presume that this inquiry has been made by the employer upon whom the duty devolves, and, although the servant may know of the defects, this will not defeat his claim, unless it is shown that he knew that the defects are dangerous," etc. In *Wilson v. Telegraph Co.*, 41 La. Ann. 1041, the plaintiff sued the defendant for damages "for injuries sustained by a guy wire erected for the purpose of supporting the posts of the company," and in our opinion we said: "The telephone and telegraph company had an undoubted right to erect poles, and to secure them; but this permission did not authorize them to put them up, and to secure them by wires so strung as to endanger human life." In our opinion, both the law and the evidence support the plaintiff's claim, that, as a question of fact, sufficient knowledge on the part of the deceased is not established to justify the assertion that he had assumed the risk of danger from the guy wire, and was consequently guilty of contributory fault, whereby the defendants are exonerated. The proof shows that the deceased was a young man of 19 or 20 years of age, strong and vigorous; that from his wages he contributed to the support of his parents; that by the accident he was not instantaneously killed, but that, after being knocked off the car, he fell between the one he was standing on and the next one thereto, and his limbs, passing under the car wheels, were badly mangled, and he soon after died; that, while living, he must have suffered great pain of body and mind. The plaintiffs, being his father and mother, are

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his forced heirs. Under the circumstances, we are of opinion that the plaintiffs are entitled to recover, as the forced heirs of the deceased, the sum of \$2,500, as damages for the pain and agony suffered by their son, and, also, in their own right, for the loss of his services, comfort, and support. *Perez v. Railroad Co.*, 47 La. Ann. 1391. It is therefore ordered and decreed that the amount awarded by the judge *a quo* be reduced to the sum of \$2,500, and that, as thus amended, same be affirmed; the costs of appeal being against the appellees.

JACKSON

v.

NORFOLK & WESTERN R. CO.

(*Supreme Court of Appeals of West Virginia, April 21, 1897.*)

Fellow Servants—Negligence—Liability of Master.—The test whether a master is liable to one servant for the negligence of another servant is the character of the negligent act. If it be in the doing of an act incumbent on the master as a duty of the master to the servant, the master is liable; otherwise not.

Same.—A master's liability to one servant for the negligence of another is not dependent on the grade of the servants, nor on the fact that one has authority over the other, but on the character of the negligent act.

Fellow Servants.—A conductor is a fellow servant with a brakeman and other servants on a train, not a vice-principal.

Same.—All servants engaged in the common service of the same master, in conducting and carrying on the same general business, in which the usual instrumentalities are employed, are fellow servants. A proper test of this rule is, whether the negligence of the one is likely to occur and inflict injury on the other.

Same—Vice-Principal—Liability of Master.—If a vice-principal in the particular act in which his negligence occurs is not in the line of his duty, but performing an act in the line of one who would be a fellow servant with the injured servant, the master is not liable for the negligence of the vice-principal, as he is, as to this act, a fellow servant with the injured one.

BRANNON, J. Jackson was a brakeman in the service of the Norfolk and Western Railroad Company, and was on a freight train with Gilbert as conductor. A train was being backed so as to couple it to some cars. Gilbert was standing on top of

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the rear car of the train that was backing, and an unsuccessful effort was made to couple the cars, and the train was drawn forward preparatory to a second attempt, and Gilbert waved the engineer to back up to the car, and Jackson, seeing this, attempted to jump back, and in so doing his arm was caught between the bumpers and crushed, rendering its amputation necessary. Jackson sued the company, recovered judgment, and it sued out this writ of error.

The case involves the question whether Gilbert, the conductor, and Jackson, the brakeman, were fellow servants, so as to exempt the company from liability for the alleged negligent act of the conductor in improperly calling the train back when he did.

The defendant's counsel have filed briefs, very lucid and able, in which they ask us to review this subject of fellow servancy (to coin a word to express the idea in one word). By fellow servancy we mean that where there are two servants or employees of a common master or employer, and one of them from the negligent act of the other receives injury, the master is not liable for the same, because when a servant enters the service of a master he assumes and runs the risks and dangers incident to the service, and it is unreasonable that he should call on the master to make good to him all damages that may befall him from the acts of any and of all fellow servants in the employ of the master. This doctrine originated in South Carolina in 1841, and was followed in Massachusetts in 1842, and was first held in England in 1850. *Murray v. Co.*, 1st McMullen, S. C., 385; 36 Am. D., 268, 279, and full note. The process of the evolution of this doctrine of fellow servancy has been a remarkable one, in the fact that it has engendered a discussion in all the courts of the land on frequent occasions, and has caused a woful conflict of authority in innumerable cases, and he who undertakes to examine it will be wearied in mind, and almost hopeless of extracting from text books and decisions any certain, definite rule upon the subject. The difficult question is, who are fellow servants?

Necessity calls for some test or rule generally applicable in the multitudinous cases everywhere; and a principle of justice here presents itself furnishing that rule, putting on the master Fellow Servants—
Negligence—Liability of Master. liability when he should bear it, and leaving with the servant the misfortune where he should bear it. That principle logically says that we must look at the act negligently done causing the injury, and if the performance of that act is a duty which the master is required by law to do properly, then he is liable, whether he negligently do the act himself or through another as his servant; but if it is not an act of duty imposed by law upon the master, but one purely the duty of another servant to do properly, both for the benefit of his master and of his fellow servant, the master is not liable. I repeat that it depends on the character of the act negligently done. Is it a duty of the master to the servant? We must therefore see what duties the master owes the servant. These duties are well summed up according to the received law in *Madden v. Railway Company*, 28 W. Va., 617, as follows: First, to provide safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and making proper inspections and tests. Second, to exercise like care in providing and retaining sufficient and suitable servants for the business. Third, to establish proper rules and regulations for the service, and having adopted such to conform to them. All the foregoing duties, it will be observed, are included in the one general duty of the master to provide a safe plant. The law is well settled that the master is not required to be a guarantor or insurer in this behalf; but is only required to employ reasonable and ordinary care in selecting what he requires and is necessary for his business. I will add that he must furnish a safe place in which his servant is to work.

The doing of these things is a duty of the master to the servant for the latter's safety. The master can

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either perform these duties personally, or he may delegate their performance to some one else, whom the books call vice-principal, because he stands as to these duties in the place of his master ; but if either fails in the performance of duty in any of these respects, and damage results to a servant, the master must answer. If, however, the damaging negligent act is not one of the things which rest on the master as a duty to the servant, it is the act purely of a fellow servant, and the injured servant must look to him, not to the master. These duties falling on the master to perform are called in the law books non-assignable duties, because he owes them to the servant, and he cannot assign them to another to perform and exempt himself from liability for their misperformance. These duties are sometimes spoken of as duties in construction, preparation, and preservation, as contrasted with mere work of operation. For instance, the construction of the railroad or other work, the preparation of machinery and implements to be used in the business, the preservation of the track or working place, or machinery and appliances, in proper, safe condition, and the selection of proper servants to work. The master having well done his duty in these things, their handling and use in the prosecution of the work designed is a work of mere operation, and this work the servants must perform well in the interest of their master and fellow servants, and if one fails to do so, and injures a fellow servant, the master is not liable, since he cannot always stand by and watch the servant in his every act in the carrying on or operation of the business, and the law of necessity permits him to commit this work of mere operation to other hands. To illustrate : the employer must furnish a good wagon, railroad car, or brake or mowing machine, and failing herein to the injury of his employee using them in ignorance of deficiency, he must repair the injury ; but, having them, if one servant by their careless use injures a fellow servant, the master is not to repair his injury. For the misuse of these things by a servant the master would be liable to

strangers, but not to another servant, because when he entered upon the service he assumed the risks and dangers that might occur in the business, among them the danger that he might receive injuries from the negligence of a fellow servant. It would be unjust to make the master an insurer of every servant against the negligence of every act of other servants, in many instances numbering thousands, working over hundreds of miles or a wide area of territory, the master necessarily himself absent. What man or corporation engaged in any business could endure such danger and burden? It would be a crying injustice to the farmer, merchant, coal operator, railroad or steamboat company, to all business operators. The law is severe enough in holding employers responsible for good track, machinery, &c., as above stated, without making them guarantors for the acts of every servant. You cannot make the master liable for an act of mere operation, no matter by what servant done; you cannot exempt him for an act not one of mere operation, but of his personal duty, though done by any servant. If he does the act in person, he is liable, regardless of the character of the act. Whart. Neg., 1, section 205; Beach, Contrib. Neg., sections 302-3. This is the rule of reason and justice. It is supported by the great volume of authority in text writers and decisions. But another rule has been followed to a very considerable extent, known as the rule of "superior servant;" that is, where the negligent servant is in grade of employment superior to the injured one, or where one servant is placed by the master in a position of subordination and subject to the orders and control of another in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master, as his *alter ego*, or vice-principal, and the inferior servant is injured by the negligence of the superior servant, the master is liable. This rule, as McKenney on Fellow Servants, section 43, says, has produced endless confusion, and is favored by many text writers, and adopted by the Southern and

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Western courts, and by the United States Supreme Court; but, on the other hand, the entire doctrine of the liability of the master for a superior servant's tort to an inferior is repudiated by courts whose number and authority outweigh those favoring the doctrine. But since Mr. McKinney wrote that rule has been overthrown by a change in the supreme court of the United States, whose decision in the case of *Chicago, &c., Co. v. Ross*, 112 U. S., 377, has been the parent of much erroneous decision upon this subject. That case held that a conductor was a vice-principal, standing in the shoes of the master, because given authority and control over his train and of other employees on it, to direct and order them, and was thus a superior servant clothed with the authority of the master, and that his negligent act, injuring other servants, rendered the master liable, because he was a superior servant. This doctrine did not render the question of the master's liability or non-liability dependent on the true principle, that is, an inquiry whether the act performed by the conductor was a duty of the master to other servants, or one of mere conduct or operation of the business, but the simple fact that he controlled the train and could direct and order other servants made the master liable, although it is plain that that conductor did only his part in the mere management and operation of the train along with brakemen and other trainmen. It made the grade or control of the conductor, because in some respects superior, the controlling element. Mr. Bailey, in his work on *Master's Liability for Injury to Servants* (page 239), says that in the *Ross* case a wide departure from the true principle was made, and that perhaps no decision of that court created greater surprise in the profession; that its influence had been wide, many states, after years of uncertainty, adopting its rule as the correct solution of a vexed problem, and that it was prophesied by many jurists and lawyers that this doctrine would be temporary and of short duration; that it was rendered by a divided court, five to four, and the

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reasoning of the court not satisfactory. That prophecy of its short duration was not long in being realized. In *B. & O. R. Co. v. Baugh*, 149 U. S. 368, it was virtually repudiated, being limited to the particular facts of the Ross case, and held not a rule of general application. The court said that "so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and thus assumed by the employee, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this: There must be some personal wrong on the part of the master; some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible." The court quotes with approval the opinion of the Supreme Court of Kansas, as furnishing the true rule: "A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employees. And at common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employee stands in the place of the master and becomes a substi-

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tute for the master, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts of negligence of any mere fellow servant, or co-employee of such servant, where the fellow servant or co-employee does not sustain this representative relation to the master." The court said: "*Prima facie*, all who enter into the employ of a single master are engaged in a common service and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants."

In the later case of N. P. R. R. Co. v. Hambly, 154 U. S. 349, a day laborer of the company working on a section force was held a fellow servant of an engineer and conductor of a passenger train, and it was held that that laborer could not make the company liable for the negligence of the engineer or conductor. JUSTICE BROWN there shows that the law, as between laborers upon a railroad track and the conductor or other employees of a moving train, the courts of most of the states regard as fellow servants, but in some otherwise. This case is contrary to the Ross case and overrules it. In the later case of Central R. R. Co. v. Keegan, 160 U. S. 259, it was held that one of a force of men in the service of a railroad company, employed in coupling and uncoupling cars under the orders of one of them, receiving an injury from the negligence of the boss, could not hold the company liable because the boss and he were fellow servants. The court repeats the rule that the rightful test is whether "the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair, reasonable precautions to surround his employees with fit and careful co-workers and furnishing a reasonably safe place to work, and reasonably safe tools and machinery, thus making the question of liability of an employer for an injury to his employee turn rather on the character of the alleged

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negligent act than on the relations of the employees to each other, so that if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor." And, in the still later case of N. P. R. R. Co. v. Peterson, 162 U. S., 346, the court carefully and pointedly reviews this subject, and lays down the doctrine that a foreman of a gang of laborers, having in charge the superintendence of the gang in working, with power to hire and discharge hands, and exclusive charge of their direction and management in their employment, is a fellow servant in fact and law with others of the gang, and that the company is not liable for an injury received by one of them from the negligence of the foreman because of their fellow servantcy. The court went on to define the duties of a railroad company as master towards its employees, and says that "the general rule is that those entering into the service of a common master become thereby engaged in a common service and are fellow servants, and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to protect such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad

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track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employees, and if the employee suffer damage on account thereof the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such.

In addition to the liability of the master for his neglect to perform these duties, there has been laid upon him by some courts a further liability for the neglect of one of his servants in charge of a separate department or branch of business whereby another of his employees has been injured, even though the neglect was not of that character which the master owed in his capacity as master to the servant who was injured. In such case it has been held that the neglect of the superior officer or agent of the master was the neglect of the master, and was not that of the co-employee, and hence that of the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances." The syllabus in that case says :

"The previous cases in this court on this subject examined, and found to determine the following points as to the liability of a railroad company for injuries to an employee alleged to have been caused by the negligence of another employee while the injured person was in the performance of his ordinary duties :

"1. That the mere superiority of the negligent employee in position and in the power to give orders to subordinates is not a ground for such liability.

"2. That in order to form an exception to the general law of non-liability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department,

and not of a mere separate piece of work in one of the branches of service in a department.

"3. That when the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the persons placed by the master in charge of these separate branches and departments and given control therein may be considered, with reference to employees under them, vice-principals and representatives of the master as fully as if the entire business of the master were placed by him under one superintendent."

On these principles in the case of *N. P. R. R. Co. v. Charless*, 162 U. S., 359, it was held that a laborer in a gang riding in a hand car over the road to inspect the road injured by a collision with a freight train, could not recover from the company for negligence of its servants on the freight train to give signals of its approach, because those servants were fellow-servants, nor could he recover for negligence of the foreman in running the hand car at too high a rate of speed, because he, too, was a fellow-servant with the injured party. Thus the supreme court has recalled its departure from the true rule, and now leads in the announcement of the true rule in these repeated latest decisions. That the *Ross* case was overruled in the *Baugh* case is admitted in the *Baugh* case in the dissenting opinion of JUSTICE FIELD, who wrote the opinion in the *Ross* case. It must not be supposed that the supreme court in these cases was acting on the legal decisions in the states from which the cases came, for in the *Baugh* case it is expressly ruled that it was a question of general, not local, law, and the principles enunciated were those of the general, and not local, law.

After completing, but before delivery of this opinion, I discover that on 15th February, 1897, the United States supreme court, in *Oaks v. Mase*, held that "an engineer on one train is a fellow servant with a conductor on another on same road," citing the four cases I cite above, thus adhering to their doctrine. Only one judge dissented.

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I believe this doctrine, as an original proposition, correct. However, if the highest court in the land, upon this question, arising, not in one state, but daily in every state, had not changed its rulings, as our former cases followed it, I should not favor a departure from those cases. But how can we stand out against that court in its latest position upon a question in which there ought to be uniformity of decision, approved, as it is, by the most numerous and best text writers? The federal courts in this State will follow it, as they are doing elsewhere. *Cleveland, &c., v. Brown*, 73 Fed. Rep. 970; *Balch v. Haas, Id.*, 974, both circuit court appeal cases. Why, in the same state, shall we have clashing rulings on exactly the same subject?

I have just met with the opinion by JUDGE GOFF in the Virginia case of *Thom v. Pittard*, 8 U. S. App., 597, holding that a foreman engaged on a work train in hauling material for repair of road, who acted as conductor and was foreman of the gang of laborers under him, and a section master having men under him employed in keeping the roadbed and track in order, and who used for that purpose a portion of the load on the work train, were fellow servants with the laborers under them. I refer to JUDGE GOFF's opinion as harmonizing in substance and spirit with the principles above stated by me. See Mr. McKinney's note of satisfaction at the change of position by the supreme court in 54 Am. & Eng. R. Cas. 364.

That latest and invaluable work on railroads, issued this year in four volumes, Elliott on Railroads, in section 1330 criticises the Ross case as having brought error into some of the decisions, and in section 1333, having since seen the decisions in the Peterson case and the Charless case, says that they "deny much of the doctrine asserted in the Ross case, and assert a rule which is in line with that asserted by most of the state courts." Elliott says, in section 1276, that if the duty be of a nature that is assignable, one of mere operation, not resting upon the master, he is not liable. In other words, the right to assign or delegate a duty conclu-

sively implies that the duty is not that of the master in such a sense as to render him responsible for negligence in its performance.

The Supreme Court of Virginia has recently reviewed all the Virginia cases on this subject and follows the Supreme Court in the Hambly case cited above, in Norfolk, etc., R. Co. v. Nuckols, 91 Va. 193, holding that the liability of the master does not depend upon gradations in employment unless the superiority of the person causing the injury was such as to put him in the category of principal or vice-principal, and laying down as the true rule that above stated in this opinion, holding that the test is that where the departments in which the negligent and the injured persons labor are so far separated from each other as to exclude the probability of contact and of danger from the negligent performance of their duties by employees of the different departments, then the servant is not taken to have contemplated such danger from the other servant in another department, as one incident to his employment when he entered the service, but that the mere fact that the servant injured is in another department of service does not render the master liable.

The rule above stated has the approval of other great text writers: Bishop on Non-Contract Law, sections 665, 671, 672, 673; JUDGE DILLON gives it his emphatic approval as the only true rule in 24 Am. Law Rev., 175, quoted in opinion in Ell v. N. P. Co. (N. Dak.), 26 Am. St. R., 627. That case holds the rule that the character of the act, not the grade of the servant, governs. The opinion of CORLISS, C. J., is a very strong and clear discussion of the subject. 36 Am. Dec., 279; New Pittsburg, etc., v. Peterson (Ind.), 43 Am. St. R., 327. (See further citations below.)

Now let us turn to the West Virginia cases. So far as they define the general rule I think they are in harmony therewith, though in some instances the rule has been misapplied in making persons vice-principals who were only fellow servants. Riley v. Railway, 27 W. Va., 145, recognizes that to make the master liable for

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the acts of his servant, that act must relate to the discharge of some duty which the master owes to the employee. So in point 3 of *Madden v. Co.*, 28 W. Va., 610. So, as I understand it, is the general principle stated in *Daniel's Adm'r v. Railway Co.*, 36 W. Va., 397, and in *Core v. R. R. Co.*, 38 W. Va., 456. Such is the general principle, but it is often difficult to apply, to say whether the particular act is one of the duties placed upon the master for the benefit of his servants, and so one that is non-assignable, for which the master is still liable, or one of mere operation. Now, our cases of *Madden v. Co.*, *supra*, *Daniel's Adm'r v. Co.*, *supra*, and *Haney v. R. R. Co.*, 38 W. Va., 570, holding that a conductor is a superior servant or vice-principal, and not a fellow servant with other employees, spring from the Ross case, and, I am compelled to say, are not sound in principle. I have always entertained, myself, a different opinion from those cases, but thought the *Madden* case governed us. The prop has fallen from under those decisions. We ought to be right. The Supreme Court has reversed itself. Why not we do so? It is not a rule of property.

Why is not a conductor a fellow servant with other servants on that or any other train? He is not the head of another department, nor working in another separate department, so as to enable us to say that the injured servant did not contemplate the negligence of the conductor as one of the dangers which he might have to encounter.

The conductor is simply an operative, he simply carries on the work of actual operation; he uses the track and cars provided by the master for the transaction of his business, just as the engineer and fireman use the engine and the brakemen use the brakes. His functions are purely those of mere operation. As stated above, he is not in another separate department from other servants on his train, nor performing the work of a separate department, but simply a particular piece of work in the operating department. His mere superiority or power of control in some respects cannot take him

out of that classification or category. Most eminent authority positively settles this. The Supreme Court of the United States so held. Would you say that when the farmer, mine owner, or lumberman sends a lot of hands upon his work in charge of a foreman, or boss, or overseer, call him as you may, he is to indemnify them against the every mistake of the foreman while doing the work? That would make every business very perilous. If not in such case, why a railroad company be made to indemnify when it sends a lot of trainmen to run its train under the control of a conductor? It must employ a competent conductor, but not be required to insure against his error of judgment. You cannot do so unless you change the rule laid down in this court and elsewhere, that it is the character of the act, not the grade or control of the foreman, that ought to guide. I think an excellent test is put in the last clause of the syllabus in *Valtez v. Ohio, &c.*, 85 Ill., 500: "Those who are engaged in the service of the same master in carrying on and conducting the same general business, in which the usual instrumentalities are employed, may be justly called fellow servants. A proper test of this relation is, whether the negligence of the one is likely to inflict injury on another." This means that if one may chance to be hurt from the negligence of another, he is deemed to have contemplated and risked that chance when he entered service, and they are fellow servants. May not a brakeman assume a chance of danger from mistakes of a conductor?

The latest railroad law work, *Elliott on Railroads*, section 1330, says: "There is comparatively very little conflict upon the question as to whether trainmen engaged in operating the same train are fellow servants, the very decided weight of authority holding them to be fellow servants. This seems to us the only rule that can be defended on principle, for such employees are in the strictest sense engaged in the service of a common master; their service is of the same general character, and the object of the service is a common one. The doctrine declared in a case decided by the

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Supreme Court of the United States has created some conflict, and, as we ventured to say, brought error into some of the decisions, but the case to which we refer cannot be regarded as expressing the rule which now prevails in the Federal courts. We cannot perceive how the doctrine which declares that employees of the same train are not fellow servants can be upheld without violating the principle that the details of operating a railroad do not pertain to or form part of the master's duty. Under the rule which we have stated, conductors, engineers, firemen, brakemen, and baggage masters of the same train are fellow servants. There are cases which apply what is sometimes called the 'doctrine of subordination' to trainmen performing service on the same train. Conductors are usually considered, in the line of decisions just referred to, as superiors, and not as fellow servants, for which heresy the *Ross* case, so often referred to, is to a great extent responsible." (In the section of *Elliott* afterwards written, it is shown that the *Ross* case has been overruled, as above stated.) *Elliott* in section 1331, says: "It seems to us that the rule must be the same whether the trainmen are engaged on the same train or on different trains. There is, as we think, no valid reason for discriminating between cases where the employees are engaged in operating the same train and cases where they are engaged in operating different trains. In both cases they are employed in the same line of service, and by a common master. The weight of authority preponderates very strongly in favor of the doctrine that trainmen, although employed on different trains, are fellow servants, but there is some conflict of authority upon the question." I cite the case decided in 1895, of *Wooden v. Railroad Co.*, 147 N. Y., 508, holding conductor and other trainmen to be fellow servants. Note 7, *Am. & Eng. Ency. L.*, 870; also *Dow v. K. P. Co.*, 8 *Kans.*, 642; *Jenkins v. Richmond and Danville R. R. Co.* (S. C.), 39 *Am. St. R.*, 750; *Baltimore Elevator Co. v. Neal*, 65 *Md.*, 438; *Knahtla v. Co.*, 21 *Ore.*, 136, and cases cited, 148; *Heine v. Chicago, &c.*, 58 *Wis.*, 525.

I therefore put it as sound law, that as the question of fellow servantry depends on the character of the act, the grade or rank of the negligent and injured servant, or whether one had authority or control over the other, is immaterial, and that this rule is supported by the better reason and the latest and best authority of text writers and court decisions. In addition to those cited above I cite 3 Wood, Rail, 1788; 3 Elliott on Railr., section 1316; Wood, Mast. & Serv., section 448; Story, Agency, section 453; Webb's Poll. on Tort, 121; 7 Am. & Eng. Ency. L., 834; Hankins v. N. Y. Co., 142 N. Y., 416; 40 Am. St. R., 616; McElligott v. Randolph (Conn.), 29 Am. St. R., 181; Galveston, &c., v. Smith (Tex.), 16 Am. St. R., 76; Harrison v. Detroit (Mich.), 19 Am. St. R., 180; New Pittsburgh, &c., v. Peterson (Ind.), 43 Am. St. R., 327; Mobile, &c., v. Smith, 59 Ala., 245; Same v. Thomas, 42 Id., 672; Jenkins v. Richmond (S. C.), 39 Am. St. R., 750; Mech. on Agency, section 668; N. & W. R. R. Co. v. Donnelly, 88 Va., 853; Avery v. Meek, 96 Ky., 192. I quote in this connection, as very strong, the language of the eminent JUDGE COOLEY in Cooley on Torts, 639: "In some quarters a strong disposition has been manifested to hold the rule (of fellow service) not applicable to the case of a servant who at the time of the injury was under the general direction and control of another, who was intrusted with duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other, and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. Nor, on grounds of public policy, could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be subjected to risks. Sound policy seems to re-

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quire that the law should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him so far as he may find it reasonably practicable, and be reported to his employer if needful, and in this regard it can make little difference what is the grade of the negligent servant, except as a superior authority may render the negligence more dangerous."

The supreme court of Indiana in *New Pittsburgh, &c., v. Peterson*, 43 Am. St. R., 332, says, as I say myself, that this rule of fellow servancy is founded in wisdom, and departure from it dangerous to the prosperity and perpetuity of enterprises of mining, manufacturing, railroading, and those industries requiring the service of many employees; and departure from it would increase the danger of employees themselves, as it inspires diligence and watchfulness to save themselves and co-laborers, as well as their employers. Abandon the rule, and inducement to care is gone, and each workman has nothing to do but look out for his own safety. This doctrine is indispensable in our days of numberless enterprises operating with innumerable employees and machines and appliances. This doctrine, that where the faulty servant is a superior servant having authority over the injured one, arose in Ohio in *Little M. Co. v. Lewton*, 20 Ohio, 415. The court became dissatisfied with it in *Pittsburgh, &c., v. Devinney*, 17 Ohio St., 197, and refused an action by a brakeman against the railroad for negligence of a conductor on another train. The dissenting judge said it was a departure from the former decision. He admitted that the rule of the *Little Miami* case was contrary to the rule outside Ohio, "that a servant, without regard to his grade of authority or position, cannot maintain an action against his employer for the fault of a fellow servant." The former case allowed action by engineer for negligence of the conductor on same train. The dissenting opinion in the *Little Miami* case is very elaborate and strong in support of the true rule. From

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Avery v. Meek, 96 Ky., 192 (September, 1893), the Kentucky court seems to qualify its former holding by saying, after admitting that the rule in a majority of states is as above given, that one servant cannot recover for negligence of a servant superior in authority unless it be gross. An unreasonable distinction. It may be that Allen v. Goodwin, 92 Tenn., 385 (March, 1893), shakes the former rule in that state. 1 Bev. on Neg., 835, states the English rule to be that at common law "a master is not liable to any servant for any injury which arises from the act or default of any fellow servant, whether that fellow servant be in a position of authority or not."

For these reasons I think that Jackson and Gilbert were fellow servants.

There is another feature of this case strengthening the position, though not necessary to its support, that they were such fellow servants, Same.

In this: Suppose that a conductor, in his own line of duty, is a vice-principal, as he is not, yet here he was performing simply the work of a brakeman in waving to the engineer. Plainly this was an act of mere co-operation of the cars by hands, not a duty of the company. In Deep Mining Co., &c., v. Fitzgerald (Colo.) the opinion said that, "When the manager or vice-principal undertakes work in simple co-operation with other servants and upon precisely the same footing with them, he becomes for the time being, a mere fellow servant with them acting as such. Thus, for example, a conductor while acting as such in starting or delaying a train, in warning or failing to warn the other train hands, or in any other respect performing the usual duties of a conductor, is not, under the American rule, a fellow servant with a brakeman on the same train.

But when he offers to assist the brakeman

in handling his brakes or in coupling cars he acts only as a fellow servant, such work being no part of the duty of a conductor as such." "If the negligence complained of (that is, the negligence of the vice-principal) consists of some act

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done or omitted by one having such authority which relates to his duties as a co-laborer with those under his control, and which might just as readily happen with one of them having no such authority, the common master will not be liable."

"The better rule, as we extract it from the best-reasoned cases, is that for the acts of the vice-principal done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, the master is liable, while for all such acts as relate to the common employment and are on a level with the acts of the fellow laborer, except such acts done by the vice-principal against the reasonable objection of the injured servant, the master is not responsible. In other words, the test of liability is the character of the act, rather than the relative rank of the servants. See 26 Am. St. R., 622, 625; GREEN, J., *Criswell v. Railway Co.*, 30 W. Va., 814; *Core v. Co.*, 38 *Id.*, 456; *Rodman v. Co.*, 17 Am. & Eng. R. Cas., 521; 3 Elliott on Railr., section 1319. This position may not be so clear, for if the conductor be vice-principal, then the act is as if done by the master in person, and no matter what the character of that act, one of mere operation or not, if done by the master in person he is liable. So held in *Berea Stone Co. v. Kraft*, 31 Ohio St., 289; 27 Am. R., 510.

It is said in argument that the declaration is bad because it does not negative the idea that the injury emanated from the act of a fellow servant. It charges that the cars were "by the wrongful and negligent acts of the defendant company, its agents, servants, and employees, wrongfully, carelessly, violently, and negligently precipitated on and against said infant plaintiff." I do not think that the declaration need allege the position of the negligent servant or show affirmatively that he was not a fellow servant. In some states such would be required, but in this state it is sufficient to charge generally the act as having been negligently done, without negating the fellow servancy, just as it is settled in this state that such a

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General charge of a negligent act is sufficient, without negating contributory negligence.

This debars the plaintiff from recovering. He says that he was attempting to couple to some cars standing on the track a train composed of an engine and six or seven loaded coal cars, which was being backed up to the standing cars. He says

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The cars came together without coupling, and did not couple, and he then waved the engineer down, and the train separated from the cars a distance of six feet, and there stood, and that he went in to couple the cars, and that Gilbert, standing on the car of the moving train above him, instead of waiting for Jackson to signal the train to back again, himself signaled it and brought the train too quickly back, and caught his arm in between the bumpers and smashed his arm from the wrist to the elbow. Now, Gilbert denies having given any signal, but says Jackson did so. Gilbert and two other witnesses in their evidence substantially show that Jackson signaled the train to back, and that it did not stop before Jackson received his injury. The features of the case seem to show that Jackson signaled the train, and by carelessness, or want of that great caution and prudence conforming to the usage of brakemen, received the injury. The cars were on a sharp curve. He went between them on the inside of the curve, thus endangering himself from being pinched by the corners of the cars, whereas he should have gone in, under the practice of brakemen, on the outside of the curve, and the bumpers would there have saved him from any accident if he had not placed his hand directly between the bumpers, contrary to the rules of brakemen and the plainest principles of self-preservation. Being on the inside of the curve, to avoid being pinched at the corner he would naturally press too close to the bumpers, and he more likely injure himself, whilst on the other side he could have stood a considerable distance from the bumpers and been safe. But, at any rate, why should he have had his whole forearm directly in front of the

bumpers, when, as he and all others show, in coupling the arm should be below those bumpers, simply taking hold of the link, directing it so as to enter the drawbar of the car? The bumpers are made for the very purpose of bumping against each other and keeping the cars from coming closer together and saving the brakeman. He did a thing of manifest danger, dispensed with the use of the appliances prepared by the employer to save him by placing his arm in the very place where it would surely be caught, without call for so doing. At no time, under no circumstances, had he right or need to put his arm there. A man engaged in such dangerous work is bound to use the most astute caution and care. He was an experienced brakeman.

Now, let us discard the idea that Jackson waved the train back, and say that Gilbert did that. It may be said that Jackson was not expecting the conductor to wave the train back, but to give the signal himself, and, therefore, did not have his arm in the right place. He says that when the cars first came together they would not couple. Then he waved the engine down and went in to make the coupling, the conductor standing on the car above him, and "as I aimed to make the coupling, he, the conductor, waved the engineer back, and I saw him and aimed to jump back, but before I could do so the cars caught me," using his own words. Now the backing train was six feet off. Jackson says he saw the conductor wave the train back. Then he had time to get out or to properly place his arm and hand under the bumpers, for he and all say that the train had seven loaded coal cars to back up a very steep grade on reverse curves, the track slippery, having to sand it, the engine slipping, and the movement very slow. Jackson complains that the conductor waved the train back before he was ready for it, yet he says he saw him wave, and surely he could prepare or get out while this loaded train was starting and going the six feet in its very slow, labored movement. All the evidence shows that the engine could scarcely back its cars up that steep

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ade and sharp curve. He had timely warning to take
arm away. It should never have been there. Gil-
rt denies waving the train back, and it looks like
ckson did, because if he had we would expect him,
er doing so, to be in between the cars to couple
em, but if he had not given the signal, hardly so.
y, however, that the conductor did wave the train
ck, and that Jackson did not see him, though he says
did, it is scarcely possible that with a lantern Jack-
n would not see the train start its movement and
me back soon enough to get out of the way or prepare
it. So we can say that he did not use that care and
ution required in such dangerous business. Is it jus-
e, between man and man, to hold the employer liable
der such circumstances? Had it not been for the
gligence of Jackson in a place of calling for the most
atchful prudence, the misfortune would not have
ppened. Reversed and new trial granted.

ENGLISH and McWHIRTER, JJ., concurred.

DENT, J., dissented.

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v.

STANKARD *et ux.*

(*Supreme Court of Ohio, March 30, 1897.*)

Relief Departments—Rights of Beneficiaries.—One of the rules in
relief department of a railroad company provided that all
ims of beneficiaries should be submitted to the determination of
superintendent, whose decision should be final and conclusive,
less appealed to the advisory committee, and in case of such ap-
l the decision of the committee should be final and conclusive
on all parties, without exception or appeal. *Held*, that, after the
ection of a valid claim by the advisory committee, the beneficiary
ld maintain an action in court for the recovery of the money due
reon, and that such rule is not a bar to the action.

(Syllabus by the Court).

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ERROR to Erie county circuit court.

The action below was brought by John Stankard and Anna Stankard, parents of Michael Stankard, an unmarried man at the time of his death, against the Baltimore & Ohio Railroad Company, for the recovery of sick and death benefits growing out of said Michael's being an engineer in the transportation department of said company, and a member of the relief feature of the department, and entitled to the benefits provided by the regulations of said department for a member of class D. Michael became sick on the 27th of January, 1890, and continued sick until his death, on the 13th day of November, 1890; and, having received no sick benefits during his sickness, his parents were entitled to receive \$484 sick benefits and \$1,000 death benefits, in case they were entitled to receive anything. The petition made the proper averments, including performance of all conditions. The railroad company, in its answer, set out certain of the rules of the relief department, and denied that Michael was in its employ at the time he became sick or at the time of his death, and denied that he properly notified the company of his sickness, and also claimed that rule 11 was a complete bar to the action. The jury returned a verdict in favor of the plaintiffs below for the full amount claimed. A motion was made by the railroad company for a new trial, which was overruled, and judgment entered on the verdict, to which proper exceptions were taken. The circuit court affirmed the judgment. Thereupon a petition in error was filed in this court, seeking to reverse both judgments. *Affirmed.*

J. H. Collins and H. L. Peeke, for plaintiff in error.
Phinney & Merrill, for defendants in error.

BURKET, C. J. (after stating the facts as above). The questions as to whether or not Michael Stankard was in the employ of the company at the commencement and during the time of his sickness, and at his death, and whether or not the company was properly notified of his sickness, are questions of fact, submitted

to the jury upon testimony competent in character, meagre and unsatisfactory in substance, but from which a jury might find, as this jury did, in favor of the plaintiffs below.

The only matter in the case deemed worthy of report as to the validity and scope of rule 11. The following is a copy of the rule: "Rule 11. All claims of members of the relief feature, their beneficiaries or other representatives, or of depositors or borrowers of the savings feature, or of pensioners, arising under these regulations, and all questions of controversies, of whatsoever character, arising in any manner or between any parties or persons, in connection with the relief department or the operation thereof, whether as to the construction of language or meaning of the regulations, or as to any writing, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the relief department, whose decisions shall be final and conclusive thereof, subject to the right of appeal in writing to the committee, directly or through the advisory committee, within thirty days after notice to the parties interested of the decision. When an appeal is taken to the committee, it shall be heard by them, without further notice, at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum of the members present; and the decision arrived at hereon by the committee shall be final and conclusive upon all parties, without exception or appeal." The claim was presented by the parents to the superintendent of the relief department, who did not allow it, but referred it to the advisory committee; and that committee declined payment of the claim "because of his failure to report in accordance with the regulations," and so notified plaintiffs below. The reference of the claim to the advisory committee, and its action thereon, and notice of such action to the parents, was the equivalent and took the place of an appeal; so that the case

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stands as if an appeal had been taken, and the claim rejected by the advisory committee. It is claimed by the railroad company that the decision arrived at by the superintendent if no appeal is taken, or by the committee in case of an appeal, is final and conclusive, and a complete bar to an action for the recovery of the benefits. If the superintendent had rejected the claim, and so notified the parents, and they had failed to take an appeal to the advisory committee, it may well be doubted whether they could have sustained an action in court upon the claim, because in such beneficial associations it is held that the claimants must pursue, to the full extent, the remedy provided by the rules and regulations, before resorting to actions at law. This is for the benefit of both parties, and is reasonable. *Supreme Council, etc., v. Forsinger*, 125 Ind. 52.

But in the case at bar the equivalent of an appeal was had, and the advisory committee acted upon and rejected the claim, and then the parents were compelled to either abandon the claim or resort to an action at law. Does rule 11 bar such action? We think not. A long line of decisions hold that parties cannot by contract take away the jurisdiction of the courts in such cases, and that the attempt to do so is void. *Supreme Council, etc., v. Forsinger*, 125 Ind. 52; *Whitney v. Association*, 52 Minn. 378; *Insurance Co. v. Morse*, 20 Wall. 445; *Stephenson v. Insurance Co.*, 54 Me. 55; *Mentz v. Insurance Co.*, 79 Pa. St. 478; *Reed v. Insurance Co.*, 138 Mass. 572. While courts usually base their decisions upon the ground that parties cannot by contract, in advance, oust the courts of their jurisdiction of actions, a more satisfactory ground is that under our constitution all courts are open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law. Article 1, § 16. Courts are created by virtue of the constitution, and inhere in our body politic, as a necessary part of our system of government, and it is not competent for any one, by contract, or otherwise, to deprive himself of their protection. The right to appeal to the

courts for the redress of wrongs is one of those rights which is in its nature, under our constitution, inalienable, and cannot be thrown off or bargained away. There is a class of contracts which provide that the value of certain property, the amount of loss sustained, the quantity, quality, character, and value of work performed on improvements, and the acceptance of a building by an architect, and other like matters, shall be determined by a certain person named in the contract, and his determination shall be final. Such contracts are lawful, and are usually upheld. They do not oust the courts of their jurisdiction over the subject-matter, but only provide a safe and speedy manner of fixing definitely some fact which is usually of a complex and difficult nature, and one that it would not be easy to establish by evidence. Such fact, when ascertained and fixed by the person and in the manner provided by the terms of the contract, is conclusive between the parties, in the absence of fraud or manifest mistake; but the parties are at liberty, after so fixing such fact, to go into court and litigate such differences as may still exist between them. In such contracts the person selected to determine the particular fact becomes the agent of both parties for that purpose, and what is done by such agent is, in legal effect, done by the parties themselves, and, therefore, there is no hardship in holding them conclusively bound thereby, in the absence of fraud or mistake. The following cases are examples of such contracts: *Easton v. Canal Co.*, 17 Ohio, 81; *Railroad Co. v. Veeder*, 17 Ohio, 385; *Wundy v. Railroad Co.*, 14 C. C. A. 583; *Kane v. Stone Co.*, 39 Ohio St. 1; *Railroad Co. v. McGrann*, 33 Pa. C. 530; *Faunce v. Burke*, 16 Pa. St. 469; *Navigation Co. v. Fenlon*, 4 Watts & S. 205; *Hamilton v. Insurance Co.*, 136 U. S. 242. See, also, 33 Cent. Law J. 8. The following cases also throw some light upon the questions involved in this case: *Guaranty Trust, & Co. v. Green Cove Springs & M. R. R. Co.*, 139 U. S. 137; *Gittings v. Baker*, 2 Ohio St. 21; *Conner v. Drake*, 1 Ohio St. 166; *Kill v. Hollister*, 1 Wils. 129.

B. & O. R. Co. *v.* Stankard.

Such contracts are in their nature only applicable to cases wherein it becomes necessary to fix some fact, leaving the question of law to be settled by the courts upon proper proceedings. The ultimate question to be determined—the liability or non-liability of the parties—must be left to the courts. The construction of a written contract is a question of law for the court, and a provision in a contract that the construction of such contract, or the meaning of rules or regulations, shall be finally determined by some designated person, is void, because the court cannot be robbed of its jurisdiction to finally determine such questions. In insurance and other like cases, where the ultimate question is the payment of a certain sum of money, certain facts may be fixed by a person selected for that purpose in the contract; but the ultimate question as to whether the money shall be paid or not may be litigated in the courts, and a stipulation to the contrary is void. The fixing of a particular fact by the person or persons named in the contract, and in the manner therein provided, is usually a condition precedent to the bringing of an action on the contract, and the performance of such condition should be averred in the petition, or some good excuse given for its non-performance. *Viney v. Bignold*, 27 Cent. Law J. 40.

In the case at bar, the claim having gone through the course provided by rule 11, and having been rejected, the parents had the right to go into a court of justice and establish their claim, and in the trial the fact that the claim had been so rejected was not a bar to a recovery. In so far as rule 11 attempts to cut off the right of action in court, it is null and void. Judgment affirmed.

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DUVERNIET

v.

MORGAN'S LOUISIANA & T. R. R. & S. S. Co.*

(*Supreme Court of Louisiana, March 15, 1897.*)

Carriers of Passengers—Injuries—Contributory Negligence.—The passenger alighting from the train stopping at the meal station, attempts, under circumstances fully apprising him of the risk, to reach the eating house by passing so close to the baggage car, while the baggage is being unloaded, as to be injured by a trunk falling on his foot, has no claim for damages, though the passage chooses to select is used by passengers, there being another path to the eating house as convenient and direct, free from all risk or obstruction, and provided by the company for passengers to reach the eating house.

(Syllabus by the Court.)

APPEAL from parish of Lafayette judicial district court. *Reversed.*

Leovy & Leovy and Garland & Dupre, for appellant.
Orther C. Mouton, for appellee.

MILLER, J. The plaintiff sues for damages for injuries caused by a heavy trunk falling on his foot from the baggage car of the defendant's train on which the plaintiff was a passenger. The defendant appeals from the judgment awarding plaintiff \$1,000. The facts substantially are that plaintiff, in undertaking to pass in front of the baggage car when the baggage was being unloaded at a railroad station, received the injury which he claims damages. The passage on which the plaintiff was when the accident occurred is about 10 feet. On one side was the train of cars, on the other the baggage room of the depot building, and in front of this room was the baggage car with its open door to permit the unloading of the baggage. On this space between the baggage car and the baggage room,

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when the plaintiff attempted to pass, was a truck and a number of trunks, so occupying the narrow passage as hardly to leave room for any one to go by. As plaintiff approached, the car porter, but a few feet in plaintiff's front, was in the act of moving away a trunk just unloaded, and the trunk that fell on plaintiff's foot was being shoved from the car, the plaintiff in his progress reaching the front of the car at the moment when the trunk in its descent struck his foot. The train had stopped at the station to afford the passengers the opportunity for a meal. The plaintiff's purpose in alighting from the train was to obtain letters he expected at that place, and to partake of the meal, for which 15 minutes was allowed. The passage along which he walked led him to the place to get his letters, and also to a plank walk laid from the railroad track to the eating house, and it is in evidence that passengers used that passage to reach the eating house, though it led the plaintiff by the baggage car where the unloading of trunks was being effected. There was, however, another way provided by the company for passengers to reach the eating house. One of the witnesses calls it the regular path, and it is shown to be as convenient and direct as that the plaintiff chose to select. The argument for the plaintiff is, in great part, devoted to the proposition that the pathway on which he walked was used by the train passengers with the knowledge and assent of the company; that the path was connected with the plank walk leading to the eating house; and, while there is some variance in the testimony, its general tendency is to show that the path selected by plaintiff was used as much as the other to reach the eating house; hence, plaintiff contends he had the right to be there, and to protection from the alleged imprudence of the company's employees in unloading the baggage car. The line of authority on which plaintiff relies is undoubtedly to the effect that all portions of the railroad depot, permitted to be used as approaches, standing places, or exits, the passenger is entitled to use for purposes incident to his travel. The

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text writers lay down the rule and our jurisprudence confirms it. Hutch. Carr. § 561 *et seq.*; Sullivan v. Railroad Co., 39 La. Ann. 800, 2 South. 586.

In our view, however, there is another principle that must exert controlling influence on our decision. The plaintiff knew the path he chose led by the baggage car from which the trunks had to be unloaded. It is true the company used no skids, but it does seem to us the plaintiff had the intimation of the process of unloading quite as effectively as that by skids projecting from the car. The impetus of the trunk derived from skids, if used, would have caused, in all probability, the trunk to come in contact with plaintiff's foot with greater force. There was the truck lying in front of the baggage car. The trunks already unloaded lying around obstructing the passage, provoking the remark passengers like plaintiff attempting to go by: "There was no room; the trunks were in the way, they were loading and unloading." The porter was a few feet in plaintiff's front, removing a trunk just unloaded. The baggage car, with its open door plainly denoting the purpose, was on his left, in full view; and, as plaintiff in his approach came near, the employee was in the act of shoving the trunk that in its descent struck the plaintiff's foot. Giving due weight to the facts, there was no one posted there to warn the approaching passenger, it seems to us the surroundings gave all the admonition any other warning could convey. Under all these circumstances, the plaintiff continued his progress, passing so close to the car as to receive the falling trunk on his foot. We observe, too, that but a slight deflection on his part, had he paid any attention to the right, would have saved him. The petition alleges the trunk was thrown from the car, but the testimony shows no such method, and it is clear to us, with ordinary care, the plaintiff could have come to no harm from that mode of unloading. In this class of cases the law regards the conduct of the plaintiff in connection with the injury of which he complains. If imprudent himself, he cannot recover, un-

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less his neglect is overshadowed by greater neglect or recklessness of the other party, so as to make it, in legal contemplation, the cause of the accident. We find no such relation of plaintiff's imprudence with that imputed to the defendant, when it is considered, too, that the defendant had provided another way to the eating house free from any obstruction or risk, as direct and convenient to the eating house as that plaintiff chose, though longer for that other purpose of plaintiff in alighting. We are constrained to hold the accident was due to plaintiff's imprudence in seeking, under the circumstances, to pass the baggage car, and because, with the other perfectly safe way provided, he selected that attended with the risk he encountered and from which he suffered. Whart. Neg. § 361; *Johnson v. Railroad Co.*, 27 La. Ann. 53, 54. It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and annulled; and it is further ordered and adjudged that plaintiff's suit be dismissed, with costs.

NOTES.

Collision with Baggage Trucks.—In an action for personal injuries to a passenger by coming into collision with a baggage truck, while walking along the platform at a station, after alighting from a train, the questions whether he backed against the truck or was struck by it, whether he or the servant of the corporation who was pulling the truck was in the exercise of due care, and whether the platform was properly lighted, are for the jury. *Keefe v. Boston & A. R. Co.*, 27 Am. & Eng. R. Cas. 137, 142 Mass. 251, 7 N. E. Rep. 874.

The rules applicable to injuries caused by locomotives and cars do not apply to injuries caused by moving a truck on a station platform. *Palmer v. Platt*, 27 Hun (N. Y.) 534; *affirmed* in 98 N. Y. 628.

The giving of warning is not the only duty of him who draws a truck. He must move it carefully and prudently upon the platform so as not needlessly to expose any one to danger; and he should also be constantly upon the alert not to strike those who for any reason are not aware of their danger. *Palmer v. Platt*, 27 Hun (N. Y.) 534; *affirmed* in 98 N. Y. 628.

Injury Caused by Things Thrown from Car.—Plaintiff, while lawfully passing along a passenger platform to a depot to ascertain the time of departure of a train, was struck and injured by a piece of timber, thrown from a box car which the employees of the company

Notes.

ere unloading, he having no previous warning of danger. *Held*, that the company was liable. *Toledo, W. & W. R. Co. v. Maine*, 67 Ill. 298.

Passenger Struck by Mail-bag.—Where mail-bags are customarily discharged upon a passenger platform, it is the duty of the company to guard against injuries to passengers by reason of the presence of such mail-bags, and this duty extends to every part of the platform. *Sargent v. St. Louis & S. F. R. Co.*, 58 Am. & Eng. R. Cas. 44, 114 Mo. 348, 21 S. W. Rep. 823, 19 L. R. A. 460. Compare *Ohio & M. R. Co. v. Simms*, 43 Ill. App. 260.

A company is liable for an injury to a passenger who is injured while on a platform by a United States mail agent throwing a mail-bag against him, where it appears that the company knew of the dangerous habit of throwing out the mail-bags on the platform and took no steps to prevent it. *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540. *Disturbing* *Nolton v. Western R. Corp.* 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 N. Y. 313; *Pennsylvania R. Co. v. Price*, 23 Alb. L. J. 69; *Cutnam v. Broadway & S. A. R. Co.*, 55 N. Y. 113; *Muster v. Chicago, M. & St. P. R. Co.* 61 Wis. 325.—*Followed* in *Carpenter v. Boston & A. R. Co.*, 105 N. Y. 627. *Quoted* in *Sargent v. St. Louis & S. F. R. Co.*, 114 Mo. 348. *Reviewed* in *Ohio & M. R. Co. v. Simms*, 43 Ill. App. 260.—Compare *Carpenter v. Boston & A. R. Co.*, 24 Hun (N. Y.) 104.

A passenger injured while waiting on a station platform by a mail-bag thrown from the train according to custom, while running at full speed, may sue the company for such injury. *Snow v. Fitchburg R. Co.*, 18 Am. & Eng. R. Cas. 161, 136 Mass. 552, 49 Am. Rep. 40.

Where mail-bags are customarily thrown from the car upon the platform over which passengers are expected to pass, it is the company's duty to guard against accidents caused by passengers stumbling over such bags in the dark even though the bags are thrown out by postal clerks in the service of the post-office department. *Sargent v. St. Louis & S. F. R. Co.*, 114 Mo. 348, 21 S. W. Rep. 823. *Quoting* *Carpenter v. Boston & A. R. Co.*, 97 N. Y. 494; *Snow v. Fitchburg R. Co.*, 136 Mass. 552. *Reviewing* *Muster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 326.

Plaintiff's intestate went upon a depot platform to get a paper from the train newsboy, and was hit and killed by the mail agent throwing the sacks from the train, which was running at a high and unlawful rate of speed. It appeared that the company regularly permitted train boys to sell papers from the platform. *Held*, that the company was liable. *Ohio & M. R. Co. v. Simms*, 43 Ill. App. 260.—*Reviewing* *Carpenter v. Boston & A. R. Co.*, 97 N. Y. 494.

Removing Baggage.—The evidence showed that three servants of a railroad company, a brakeman and two section foremen, in removing a trunk from where it lay, on the company's station platform, which was covered with ice, to a baggage car, slid it on the ice, and out of a straight line, and against the plaintiff, who was standing in plain view upon the platform. *Held*, that the evidence was sufficient to prove culpable negligence on the part of the railroad company's servants. An old lady went to a railroad station to assist friends, who intended to remove from the country permanently, to get to the station, and upon a train then about to depart, and

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after bidding her friends good-bye, and after they had got upon the train, stood for about five minutes upon the station platform to see the train start, and to bid her friends a last farewell. *Held*, that while so standing upon the platform, she was not, by reason thereof, guilty of such culpable contributory negligence as would prevent her from recovering for injuries received through the negligence of the railroad company; and further, that no culpable contributory negligence in any respect was shown. *Atchison, Topeka, and Santa Fe R. Co. v. Johns*, 36 Kan. 769, 34 Am. & Eng. R. Cas. 480.

Injuries While Loading or Unloading Cars.—Where cars have been run out on a side track to be unloaded, a company is guilty of negligence in allowing other cars to be thrown violently against them, without warning, whereby a teamster engaged in unloading is injured; and the company cannot escape liability because its employees did not know that any one was unloading. After the cars were placed in a position for unloading, the employees had reason to anticipate that some one might be there, and should have exercised proper care. *Watson v. Wabash, St. L. & P. R. Co.*, 19 Am. & Eng. R. Cas. 114, 66 Iowa 164, 23 N. W. Rep. 380.

The evidence tended to show that plaintiff's horse and dray, with a load of lumber for shipment, were sent to a station, and the driver asked the agent where he should deliver the load, and was directed to a side platform. The track at the place was in a cut, and a side track was laid so near the platform that a horse and dray could not be driven by the side of the platform without being partly on the track. While in this position the horse was killed by a passing train. *Held*, that the evidence was sufficient to sustain a verdict for plaintiff. *Foss v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 112, 33 Minn. 392, 23 N. W. Rep. 553. See also *Carriage of Passengers*, 277.

Eating-House Stations.—A land company having built a hotel at a railroad station, which was used as an eating-house for passengers, and having constructed two bridges or platforms over a small stream which ran between the hotel and the track, using and keeping one of them in repair, while the other was used and was to be kept in repair by the railroad company, being built on its right of way, an action for damages lies against the railroad company, but not against the land company, at the suit of a passenger who, having gone over the first bridge into the hotel, received personal injuries from a defect in the other as he was returning to the cars; nor is the passenger chargeable with contributory negligence because he "could have seen the hole if he had been specially looking for it," when the evidence shows that the accident occurred at night, and that there was no light or other warning signal posted at the spot. *Watson v. East Tenn., V. & G. R. Co.*, 92 Ala. 320, 8 So. Rep. 770; further appeal, 94 Ala. 634. And see *Peniston v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 777. See also *Atchison, T. & S. F. R. Co. v. Shean*, 58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108.

Fries v. Wheeling & L. E. Ry. Co.

FRIES

v.

WHEELING & L. E. RY. CO. *et al.**

(*Supreme Court of Ohio, March 9, 1897.*)

Appropriation of Land by Consent—Rights of Owners.—Where a railroad company has taken possession of land for its right of way, and incorporated it as part of its permanent railroad track, with the verbal consent of the owner, on condition of compensation verbally promised, but refused and not performed, and without appropriation proceedings, and without any agreement in writing with the owner, such owner has an election of remedies, either (1) to proceed in the probate court to compel appropriation under section 6448, Rev. St., or (2) by assenting to such possession by the company as an appropriation in fact, and tendering conveyance, to proceed in the court of common pleas to recover compensation.

Same—Proceeding for Compensation.—Such proceeding for compensation cannot be enlarged to include an inquiry of damages to other lands; but the jurisdiction of the court of common pleas is not ousted by allegations of damages to other lands, and prayer for recovery by reason thereof.

Proceeding to Compel Appropriation—Limitations.—The proceeding to compel an appropriation is not barred by the lapse of less than 21 years from the time of such occupancy by the company.

Action for Compensation—Limitations.—Where such action for compensation is brought within 21 years from the time of such occupation, and the petition does not show that the election was made 6 years or more before the commencement of the action, it will not be subject to demurrer on the ground that the cause of action did not accrue within 6 years next before the action was begun.

(Syllabus by the Court.)

ERROR to Huron county circuit court. *Reversed.*

The action was commenced in the court of common pleas of Huron county, July 13, 1889. At the November term, 1893, plaintiff recovered a judgment against defendants in error for \$2,952.16 and costs. The action was based upon a claim for the value of land taken by the company for its permanent roadway, and for damages to plaintiff's remaining

Case Stated.

*See notes at end of case.

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lands. At the November term, 1894, of the circuit court of that county, the judgment was reversed for error in not sustaining defendants' demurrer to plaintiff's second amended petition, and not dismissing the action; and plaintiff's cause was thereupon dismissed. Other errors set out in the petition in error were not passed upon. This proceeding is brought to reverse the judgment of reversal.

G. T. Stewart, for plaintiff in error.

Swayne, Hayes & Tyler, for defendants in error.

SPEAR, J. (after stating the facts). It appeared by the second amended petition, among other things, that the land taken (3.56 acres) was part of a farm in Huron county to which plaintiff, Appropriation of Land by Consent—Rights of Owner. April 3, 1880, acquired title, with every claim and right of action of the former owner; that prior to that date the Wheeling & Lake Erie Railroad Company, without the consent of the owners, took possession of the strip, and constructed its railroad thereon; that June 25, 1886, the Wheeling & Lake Erie Railway Company, the successor of the said railroad company, without any grant or conveyance from or agreement with the plaintiff, without any right or title, legal or equitable, thereto, and with only the verbal consent of plaintiff on condition of compensation, never performed, took possession of said strip, and has since used and now uses it as an integral part of its permanent railroad. Plaintiff is entitled to recover, for value of land taken and damages to remaining land, \$4,000. Payment has been often demanded, but refused. Plaintiff here tenders due conveyance of said right of way to the railway company, and asks that the court take an account and render judgment for the amount due to him, adjudge the same a valid lien, and for other relief. The demurrer which the circuit court held ought to have been sustained was on the sole ground that the action was barred by the six-years statute of limitations.

The question arising, as stated by defendants' coun-

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sel, is: "Which section of the statute of limitations governs the suit of a landowner against a railroad company, for compensation for land taken for right of way, and for damages to land not taken, the suit being brought in the court of common pleas, and tender of a deed for the land taken being made?" And, putting their claim in brief form, it is "that the company entered with the consent of the plaintiff, and that his remedy is a chose in action for money only for the amount of the compensation for land taken and damages to the rest of the land, and that this is barred by the six-years statute of limitations on which the demurrer was based;" and the circuit court, by its judgment, affirmed this claim of the bar of the statute. Plaintiff's contention is, in substance, that the six-years limitation does not apply where there has been no agreement in writing, and has been no compensation, whether the entry was by consent of the owner or not, and that the right of the plaintiff to compensation and damages subsists so long as the company has not acquired title to the land, and that this right may be enforced by action in the court of common pleas. Which is right? Or, if neither is, what is the correct rule?

In entering upon the inquiry, let us look at the situation of the parties at the commencement of the suit. In brief, it was this: The company is a railroad corporation, authorized by law to make appropriation of private property. By its own action in 1886, and by the action of its predecessor in 1880, it was in possession of 3.56 acres of land belonging to the plaintiff, without any appropriation proceeding, without any agreement in writing, and without having paid therefor, but with the verbal consent of the owner, under a promise of compensation afterwards refused and never performed. Over and upon the land taken it had constructed its railroad, and the land had thus become an integral part of the permanent track of its railroad. Under these circumstances, what remedy or remedies, after the company had neglected and refused to pay, were open

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to plaintiff? Might he (1) resort to ejectment? Or (2) could he compel an appropriation under the statute? Or (3) was he confined to a suit to recover compensation?

As to the right of ejectment, we suppose the law is entirely settled. He could not have that remedy. His consent to the entry would estop him. *Goodin v. Canal Co.*, 18 Ohio St. 169; *Pennsylvania Co. v. Platt*, 47 Ohio St. 366. The reason for the rule lies in considerations of public convenience.

Whether or not he could compel an appropriation depends upon the statute. Section 6448 provides: "When a corporation, authorized by law to make appropriation of private property, * * * has taken possession of, and is occupying or using, the land of any person * * * for any purpose, and the land so occupied or used has not been appropriated and paid for by the corporation, or is not held by any agreement in writing with the owner thereof, * * * such owner or owners, or either of them, may serve notice, in writing, upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands, and on failure of such corporation for ten days so to proceed, said owner or owners * * * may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no right, legal or equitable thereto, * * * that the notice provided in this section has been duly served, that the time of limitation under the notice has elapsed, and such other facts, including a pertinent description of the land so used or occupied, as may be proper to a full understanding of the facts." Then follow other provisions not necessary to be recited. Section 6449 provides for summons and further proceedings relating to trial, final judgment, and collection of the same, and concludes: "But this section shall not be construed to impair or lessen in any manner the right the owner or owners * * * may have to proceed against the

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corporation as in all other cases of the unlawful entry upon lands."

No reported case by this court, so far as we are aware, has undertaken to give construction to this statute as to the precise question now being considered, and hence we are at liberty to construe the statute so as to most effectually carry out the purpose of the legislature in its enactment. And, in giving construction, the court will keep distinctly in mind that the legislature was providing a remedy for the private citizen who is in the right as against a corporation which is in the wrong. The latter, either by its strong hand forcibly, or by making a verbal promise which it has not kept, has acquired possession of the real property of the former, and is using it under its extraordinary power of eminent domain, for its corporate purposes. In such condition there surely would be no occasion for giving to the statute an illiberal construction, especially when its object is to preserve the spirit of that clause of the bill of rights which guaranties the inviolability of private property, and declares that, where taken for public use in time of peace, a compensation shall first be made in money. At least, we should give full effect to the operative words of the statute. What are they? Why, that all owners whose lands have been taken by such a corporation, and have not been appropriated and paid for, or are not held by any agreement in writing with the owner, shall have the benefit of this statute,—that is, owners whose lands have been appropriated and paid for, or are held by an agreement in writing, may not have resort to this statute; all other owners whose lands have been so taken may have. No exclusion of an owner who has consented verbally to the taking, or made a verbal agreement in relation thereto, is here expressed. If an agreement in writing has been executed by which the land is held, that is the measure of the owner's rights, and such owner cannot have the benefit of the statute. Verbal agreements are not recognized as binding, for the same reason, doubtless, that induced the enactment of our statute of frauds

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with respect to verbal contracts for land, *viz.*, to prevent frauds and perjuries. The natural effect of the words used is that, if the owner has a contract in writing on which he may rely, that must be his sole reliance, but he is not to be compelled to rely on the uncertain security afforded by the word of a right of way agent or other agent of the corporation. It seems to us reasonably clear that unless the natural meaning of the descriptive words, "The land so occupied or used has not been appropriated and paid for by the corporation, or is not held by any agreement in writing with the owner thereof," is restrained by what follows in that or the succeeding section, an owner who has not been paid for his land, and has made no written agreement for its possession and use by the company, may have the benefit of this statute, although he verbally consented to possession by the company.

It is insisted, however, that the possession by consent gives to the company an equitable right to the land. If this be so, it would follow that the fact of consent would render it impossible for the owner to truthfully make the allegation required by the statute that the corporation has no right, legal or equitable, to the land. We would not be ready to concede, even as a general proposition, that a verbal agreement by one in possession to pay for land wholly repudiated gives to the repudiator an equitable right as against the owner. Were the controversy an action of ejectment between private parties, not involving any question of the public convenience, and the defendant set up that his possession was that of a purchaser, we would suppose that, in the absence of allegations that the purchase money had been paid or was not due, he must aver that he was ready to pay, and tender payment; that, if the pleading lacked that element, it would be fatally defective, and it is difficult to see how it could stand in the way of a judgment for plaintiff on the pleadings. And why? Simply because the answer showed no equitable right in the land. But, even if this were otherwise, we would still have to inquire

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what significance is to be attached to those words used in the connection in which we find them here, and whether, within the meaning of this statute, such facts would establish an equitable right?

We suppose the rule to be well settled that the legislature is presumed to be consistent with itself; and, if in one place it has expressed its intent distinctly, it will be understood not to have changed it unless that intent clearly appears. The language of every enactment, therefore, will be construed, so far as possible, to be consistent with every other which it does not in express terms modify or repeal, and the same rule applies as to the several parts of the same act. The revocation or alteration of a purpose clearly expressed will not obtain if all the words of the act may have their proper operation without it. So too, an incidental purpose will not, ordinarily, be permitted to override the main purpose of the act. In this statute the ground of the action and the conditions on which it may be brought are given by the words: "The land so occupied has not been appropriated and paid for by the corporation, or is not held by any agreement in writing with the owner." That which follows is but matter of detail. It is a direction as to the form of the petition. It is a permission, also, that, whenever the condition described has arisen, the pleader may allege that the company has no right, legal or equitable, and warrants the inference that, within the purview of the act, the allegation would be true. To hold that a railroad company which has acquired the verbal consent of the owner to its possession, by a verbal agreement to pay, which it has wholly repudiated, is possessed of an equitable right to the land, which interferes with the enforcement of this statute, would, it seems to us, work an unwarranted modification of the ground of action itself. Such holding would restrain the operative words, and, in effect, incorporate a qualification which would impair the beneficial purposes of the enactment. It would give to that which is but an incident the effect of abridging the principal purpose. Whatever else may have been intended by the words

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"right, legal, or equitable," it is not reasonable to assume that the legislature intended, by their use in this connection, to impair the force of the operative language used, by adding a condition which would exclude a class of owners from the benefits of the statute, who, by any natural and ordinary construction of language, are included.

But it is further insisted that the entry of the company in this case could not have been unlawful, because it was by consent. Hence, it is to be inferred from the saving clause of section 6449, preserving unimpaired to owners the right "to proceed against the corporation as in all other cases of the unlawful entry upon lands," that the statute, covering, as its terms express, unlawful entries only, cannot be held to cover this case. We think the inference does not follow. The effect of this clause is to enlarge the remedy, rather than to curtail it; and it would be a queer use of logic to presume that an intention to enlarge shows also, with respect to the same subject-matter, an intention to limit. On the contrary, the clause suggests that every possession save those enumerated is unlawful; that is, every entry is unlawful, within the scope of this statute, which has not been preceded or accompanied either by an agreement in writing with the owner or by appropriation and payment. And it would follow that, where there has been an unlawful entry, the owner may resort to any remedy that is appropriate. As, for instance, if the entry was without his knowledge or against his protest, he may have ejectment, or compel appropriation, or have an action for compensation, as best suits him; or, if he had knowledge and consented to the entry, he may not resort to ejectment, but may either demand an appropriation, or affirm the appropriation in fact made by the company, and, tendering conveyance, recover compensation.

If the conclusions hereinbefore stated are correct, the plaintiff had an election to proceed under the statute, and compel an appropriation, or, accepting the acts of the company as an appropriation, sue for compensation. If he resorted to

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the former remedy, the inquiry might include as well damages to remaining lands as compensation for the land taken, and would be conducted in the probate court, inasmuch as that court alone (save under exceptional conditions named in the statute) has jurisdiction in appropriation proceedings. If, however, he preferred the latter remedy, his action might be instituted, as it was in the common pleas. But the remedy in the latter court could go no further than compensation for land actually taken. To broaden the inquiry in such case into an assessment of damages to other lands would, practically, make an appropriation case of it, and we think it clear that the statute implies that jurisdiction to entertain such inquiry shall (save in the excepted instances) be confined to the probate court.

As to the proposition that the claim of the plaintiff is, at best, a chose in action for money only, which would be barred in six years, it is sufficient to say that it has been held by this court, in *Railroad Co. v. O'Harra*, 48 Ohio St. 343, that the remedy of the statute is a substitute for an action to recover the possession; and in *Railroad Co. v. Perkins*, 49 Ohio St. 326, that the language of the act imports "that the land remains the property of the owner until it has been condemned and paid for," "which could not be if the wrongful entry of the company worked an appropriation in law, and converted the claim of the owner for land into one for money only," which decision also follows the *O'Harra Case* in holding that the right is not barred in less than 21 years. So that, if plaintiff elected to proceed under the statute, he might commence the action within the time above named; and, if his action were for compensation alone, defendant concedes that he would have six years in which to bring it. Having a choice of remedies, the plaintiff would not be held to have elected until some steps were taken looking to an enforcement of the particular remedy chosen. The defendants' argument upon the statute of limitations seems to proceed upon the theory

Proceeding to Com-
pel Appropria-
tion—Limitations.

Action for Com-
pensation—Lim-
itations.

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that the plaintiff's consent to the entry by the company was, of itself, an election to proceed for compensation only. We cannot so regard it. It is mere assumption at best, unreasonable and illiberal. We should not presume, in the absence of proof tending to establish it, that a party has selected his least valuable alternative. But, aside from this, the assumption is utterly inconsistent with the conclusion already announced, that the plaintiff had a choice of remedies, since it makes the very act which clothes him with a right to a choice of two remedies determine conclusively that he has but one. It is not important to consider here what would amount to an election, though we would suppose that it should be some unequivocal act not consistent with any other conclusion. Therefore, if the six-years limitation applies to the remedy of compensation (and we do not find it necessary to determine whether it does or not), a demurrer setting up that statute would not be well taken, unless it appeared by the pleading that six years had elapsed after election made and before suit. And, applying that conclusion to the plaintiff's second amended petition, it does not appear to be open to that objection; hence the demurrer to that pleading was properly overruled.

These conclusions are consistent with *Railroad Co. v. Hambleton*, 40 Ohio St. 497; *Nail & Iron Co. v. Furnace Co.*, 46 Ohio St. 544; *Pennsylvania Co. v. Platt*, *supra*; *Railroad Co. v. O'Harra*, *supra*; *Longworth v. Cincinnati*, 48 Ohio St. 637; *Railroad Co. v. Perkins*, *supra*; and *Daily v. The State*, 51 Ohio St. 348.

Attention is called by counsel to *Hatry v. Railway Co.*, 1 Ohio Cir. Ct. R. 426; and it is insisted that the question here is ruled by the decision of the circuit court in that case, and directly by paragraphs 6, 7, and 8 of the syllabus of the reported opinion, and that, inasmuch as the judgment was affirmed by this court, these paragraphs declare the law of the present case. Possibly the conclusion of counsel is a natural one, although, in view of the comment upon the

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Hatry Case in the opinion in Railroad Co. v. Perkins, *infra*, we do not see how it can be; but it is, nevertheless, a mistaken one. The fact, however, that such an impression obtained, and has been relied upon by counsel in this and in some other cases, makes it proper to add here some further explanation. The case in this court was entitled "Hill, Trustee, v. Hatry *et al.*," and was disposed of April 15, 1890 (23 Wkly. Law Bul. 11), by an announcement containing the following: Judgment on petition and cross petition affirmed on the opinion of the circuit court, reported in 1 Cir. Ct. 426, and authority of Compton v. Railroad Co., 45 Ohio St. 592." The points made in this court by the petition in error and cross petition in error (the pleadings referred to in the above announcement) did not involve any question affecting the right of way claimants in the court below, nor were any of them parties to the case in this court. Hence this court was not asked to pass upon any question, legal or otherwise, involved in that branch of the case below, and did not attempt to do so. The announcement conveyed to counsel engaged in the case, and others familiar with the grounds of the decision here, although an examination of the record on which the judgment of affirmance was based might be necessary to a full understanding by others. But there is no ground whatever for the belief that the paragraphs of the syllabus referred to were affirmed by this court.

In the case at bar the circuit court declined to pass upon alleged errors other than that affecting the deurrer to the second amended petition. The judgment of that court will be reversed, and the cause remanded, with directions to pass upon the remaining allegations of error, and for further proceedings according to law. Judgment reversed.

NOTES.

Eminent Domain—Election.—A landowner loses none of his rights in his land by permitting a railway company to take possession of his land without grant or condemnation. Illinois Cent. R. Co. v. Indiana, 121 U. S. 575, 18 R. Co., 85 Ill. 211. The company in such a case, is a trespasser, and the owner may

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maintain trespass or ejectment, or enjoin the construction of the road until compensation is ascertained and paid. *Jones v. New Orleans, etc., R. Co.*, 70 Ala. 227, 14 Am. & Eng. R. Cas. 217; *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 538.

Special Proceedings in Ohio.—The owner of land unlawfully appropriated by a railroad having power to appropriate land may recover compensation and damages, by special proceedings, under Ohio Rev. Stat., §§ 6448-6450, or the land itself, as in other cases of unlawful entry. *Atlantic, etc., R. Co. v. Robbins*, 35 Ohio St. 531, *reconciled in Grafton v. Baltimore, etc., R. Co.*, 21 Fed. Rep. 309, 17 Am. & Eng. R. Cas. 200.

Waiver of Remedies by Owner.—If the owner of lands, by express or tacit consent, permits a railroad company to enter thereon, construct its roadbed and track, and occupy the same for the purposes of a railroad, he thereby waives his remedy by injunction or action for the trespass, and is relegated to proceedings to have his compensation and damages assessed. *Milwaukee, etc., R. Co. v. Strange*, 63 Wis. 178, 20 Am. & Eng. R. Cas. 413. In such case the landowner assumes to the company the relation of a vendor who sells real estate on a credit; and while he holds the title, equity will enforce his claim to compensation against the land, as it would a vendor's lien. *Organ v. Memphis, etc., R. Co.*, 51 Ark. 235, 39 Am. & Eng. R. Cas. 75. Or he may sue for the value of the land taken. *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480.

Recovery by Tenant by the Curtsey.—A railroad company entered upon land in which plaintiff's wife had a third interest, and occupied the same for the purpose of a station for some years without plaintiff's knowledge. His wife died, leaving him an estate of curtesy therein. It appeared that the company occupied the whole of the premises, that they were so situated that it was impossible to set off a third, and that there could be no joint occupancy, from the nature of the use. It was held that plaintiff was entitled to recover a third of the value of the use and occupation of the premises. *Muldorney v. Morris, etc., R. Co.*, 42 Hun (N. Y.) 444. And included in such suit damages for the injury inflicted by the taking.

Injury to Tenant.—Where a company, in violation of a contract with the landlord, enters upon land held by a tenant and destroys his crops, it is liable to the tenant for the damages he thus sustains. *Louisville, etc., R. Co. v. Faulkner*, 2 Head (Tenn.) 65.

Trover for Materials.—The Pa. Lateral Railroad Act. of May 5, 1832, is not intended to give the petitioner more than a privilege to open, construct, compel, and use a railway through the land of another. He may use material from the right of way to construct the road, but coal displaced belongs to the owner of the fee, and he may maintain trover for its conversion. *Lyon v. Gormley*, 53 Pa. St. 261.

Such Action will not Lie if Land is Recoverable.—The owner of land unlawfully and wrongfully taken cannot maintain an action for the value of the land so taken and appropriated, and also damages accruing by reason of such taking and appropriation, if the circumstances are such that he may recover the land itself. *Atlantic, etc., R. Co. v. Robbins*, 35 Ohio St. 531, *distinguishing Dayton, etc., R. Co. v. Lewton*, 20 Ohio St. 401.

In one case it is held that he may recover possession in an action of forcible entry and detainer.

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Mitchell v. Illinois, etc., R. etc., Co., 68 Ill. 286, where the company forcibly took possession pending an appeal, without giving the bond required by statute.

He is not bound to resort to *mandamus* to compel the company to leave the land condemned. Allen v. Wabash, etc., R. Co., 84 Mo. 6; Lewis v. Seattle, 5 Wash. 741.

He may waive such proceedings, and elect to regard the act of the company as done under the right of eminent domain, and receive a just compensation.

Oregon v. Memphis, etc., R. Co., 51 Ark. 235, 39 Am. & Eng. R. Cas. 75; Little Rock, etc., R. Co. v. McGehee, 41 Ark. 202, 20 Am. & Eng. R. Cas. 82; U. S. v. Great Falls Mfg. Co., 112 U. S. 645; Cohen v. St. Louis, etc., R. Co., 34 Kan. 158, 22 Am. & Eng. R. Cas. 6; Highland Ave. etc., R. Co. v. Matthews, 99 Ala. 24.

FLEWELLING

v.

LEWISTON & A. H. R. Co.*

(*Supreme Judicial Court of Maine, Feb. 24, 1897.*)

Street Railways—Right of Way.—Electric street cars have, in a qualified way at least, the right of way, as against persons traveling on foot or with teams and carriages, in the same manner as ordinary steam railroads have; and all such persons should carefully serve the movements of street cars, when likely to meet them, and leave them an unobstructed passage, as well as they reasonably can.

Same—Care to be Exercised by Employees.—Great care must also be exercised by motormen and conductors on the street cars to see that no injury be caused by themselves to either persons or property. Street cars are granted very great privileges out of the public right, and their treatment of the public must be reasonable in return; so that when a person or a team, through accident or misjudgment, or for any cause, be caught in any position of peril by coming in close contact with a car, it is the duty of those managing the car to use all possible effort to avoid collision or injury.

Care to be Exercised by Travelers in Street.—Any person driving a horse on the street, especially an unbroken or uncertain animal, should exercise very great care and caution so as to pass the cars safely. But he is not to be debarred from reasonable opportunities in a reasonable manner to exercise his horse, young or old, spirited or dull, in the presence of either stationary or moving cars, in order to accustom his horse to such sights and sounds as the running cars produce, if he can.

(Official.)

***Frightening Horses.**—See note 5 Am. & Eng. R. Cas. N. S. p. 2.

Flewelling v. Lewiston & A. H. R. Co.

This was an action on the case by Samuel G. Flewelling against the Lewiston & Auburn Horse-Railroad Company to recover damages for personal injuries

Case Stated. sustained by the plaintiff in a collision between one of the defendant's electric cars, and the plaintiff's horse and road cart, which he was driving along Pine street, in the city of Lewiston, April 25, 1895. The jury returned a verdict for the plaintiff, damages \$2,797.85, and defendant moves for new trial. *Overruled.*

Plaintiff's first count alleged a great and unlawful speed of the car, and the consequent loss of control of the car. His second count alleged a rate of speed in excess of that allowed by the city ordinance.

Second Count of Declaration.

"Also for that the said defendant corporation, on the 25th day of April, 1895, owned and was then operating a street railway in said Lewiston, and then and there using its said business cars driven along the street by means of electricity; that on said day, while the plaintiff was lawfully driving his team, consisting of his horse and road cart, to which his horse was properly harnessed, said horse, harness, and road cart being then and there suitable and proper to be used by him, over and upon Pine street, a public highway in said Lewiston whereon said defendant was then and there maintaining its track and operating and driving its cars as aforesaid, said plaintiff being then and there in the exercise of due and proper care and without negligence on his part, an electric car of the defendant, then and there managed, controlled, directed, governed, and operated by the servants and agents of the defendant, said car being then and there propelled by the defendant at a rate of speed greatly in excess of the maximum rate of speed prescribed by law and the ordinances of the city of Lewiston in such case made and provided, and in violation of said ordinances, was then and there, negligently, carelessly, and at an undue, unreasonable, dangerous, and unlawful rate of speed,

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driven by the said defendant against the road cart containing the plaintiff, so that the plaintiff was then and there thrown suddenly and with great force and violence from his seat down upon the ground, and upon the track of the defendant, was stunned by the fall, his right hand run over by a wheel of said car, his body bruised and jammed, his leg and body severely burned by the electric current, and he then and there sustained other great and painful bodily injuries, external and internal, in consequence of which he suffered greatly in body and mind, was compelled to have his said right hand amputated, to submit to a long course of medical and surgical treatment for his recovery from said injuries, and put to great expense for medicine, medical attendance, and nursing, and has been otherwise greatly damaged. Plea, general issue."

The plaintiff offered testimony showing that on April 5, 1895, Fast Day, about 3 o'clock in the afternoon, he was driving on Pine street in Lewiston, on the right-hand side of the street, in a road-cart, so-called, a two-wheeled vehicle, drawn by his horse four years old, and weighing about 1,100 pounds,—a horse of gentle disposition, well broken to harness. and accustomed to electric cars. At a point in said street opposite the residence of Z. Blouin, he met a car of the defendant corporation. The sidewalk was full of people going to a ball game. The track of the defendant was in the centre of the street, which is 50 feet wide from street line to street line outside limits. The street along by the place of the accident is practically level.

The horse of the plaintiff and the car of the defendant, coming from opposite directions, were approaching each other. The horse, when at a point about 60 feet or more from the approaching car, began to act afraid of it, and tried to sheer towards the sidewalk. The plaintiff reined his horse firmly, to keep in the street and avoid running down the people on the sidewalk. The car, as the plaintiff's evidence shows, was running very fast, and the heavy current was snapping and buzzing on the trolley line. The spectacle terrified

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the horse. Not being allowed to dash upon the sidewalk, the horse, in his fright and terror, suddenly bolted across the track, in the face of the car. The car collided with the vehicle of the plaintiff with great force. So great was the force that the brake of the car, a rod of iron $1\frac{1}{2}$ inches in diameter, was broken short off by the collision. The road cart of the plaintiff was instantly demolished, and the plaintiff and his companion were thrown and dragged upon the ground until the car could be stopped. The injuries of the plaintiff were severe. His back was injured. His head was cut by a gash four inches long. His left hand was burned to a blister. His right leg was burned. And his right hand was crushed and had to be amputated.

On the other hand, the defendant contended that the plaintiff was guilty of contributory negligence; that the defendant was guilty of no negligence, was not running its cars at an unlawful or unreasonable rate of speed, and, even if it was, such speed neither caused nor contributed to the accident. The defendant claimed that the undisputed facts were substantially as follows:

The plaintiff at the time of the accident was engaged in handling and selling horses at Symonds' Stable, in Lewiston. The colt which the plaintiff was driving was one of a car load of horses brought from Kansas by a Mr. Poor, which arrived April 8th, being 17 days before the accident occurred, on Fast Day, the 25th. There was an unusual number of teams and cars in the street on that day. The plaintiff harnessed this horse into the road cart, took in Frank Edgecomb, whose brother wanted to buy a horse, and rode out into the streets. They drove up through Main street, passing a car in Haymarket square, through Sabattus street to Pine street, which they entered near Nichols Park. They were scarcely in Pine street when the car was noticed coming up the street, then at a long distance from them. They proceeded down the street until they came into collision with the car near Mr. Blouin's house.

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W. H. Judkins, for plaintiff.

W. H. White and *S. M. Carter*, for defendant.

PETERS, C. J. We apprehend that electric street cars have, in a qualified way at least, the right of way, as against persons on foot or traveling with carriages and teams, in the same manner as ordinary steam railroads have. And all persons passing on foot or traveling by the common methods on the highways should carefully observe the movements of the street cars, and leave them an unobstructed passage, as well as they reasonably can.

Street Railways—
Right of Way.

But great care must also be observed by conductors and drivers, or motormen, upon the cars, to see that no injury be caused by themselves to persons or teams. Street railroads are granted very great privileges out of the public right, and their treatment of the public must be reason-

Same—Care to be
Exercised by Em-
ployees.

able in return; so that when a person or a team, through accident or misjudgment, or for any cause, be caught in a position of any peril by coming in collision or close contact with the cars, it is the duty of those who are managing the cars to use all possible effort, by slackening the speed of a car or stopping it altogether, in order to avoid injury. If a horse driven by a traveler appears to be restive or refractory at the sight of a moving car, the movement of the car should be managed in such a way as to relieve, if possible, the traveler in his dilemma. For these reasons, as well as for the general safety of passengers within and persons outside of the cars, the rate of speed should be reasonable, according to circumstances.

The city ordinance of Lewiston limits the cars of this road to a speed of five miles an hour.

On both points to be considered, more especially on the second, the case in hand is a somewhat close one. The plaintiff contends that the car with which his horse and carriage collided was running at the time at an extraordinary and reckless rate of speed. This position of fact, as maintained by the plaintiff, is strongly contested by the defendant; and while there

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is much testimony bearing on this contention *pro* and *con*, we cannot very well assume the decision of the question ourselves, and determine that the jury committed a mistake. The implication of the verdict is that the unreasonable speed of the car caused or increased the fright of plaintiff's horse, thereby causing the accident by which the plaintiff received his very serious injury.

Care to be Exercised by Travelers in Street.

The more doubtful question, perhaps, is whether or not the plaintiff was himself guilty of some recklessness and carelessness which contributed in causing the injury. Any person driving a horse on the street, especially an uncertain and unbroken animal, when likely to meet a car, should exercise very great care and prudence, so as to cope with the occasion with safety, and, if he fails to do so, he enters on a reckless experiment at his own risk. At the same time he is not to be debarred from reasonable opportunities, in a reasonable manner, to exercise his horse, young or old, spirited or dull, in the presence of either stationary or moving cars, in order to accustom his horse to them if he can.

The horse driven by the plaintiff when he was injured was but four years old. But his driver was an experienced and fearless horseman, and he says that, during the 17 days he had owned him prior to the accident, he had been driven frequently by the cars without his showing any sign of fear or fright, and was a horse of good natural disposition.

The defense strongly urges that he could have and should have turned off into a cross street when his horse began to misbehave, and that in that way there was an easy opportunity to have avoided the collision, and the plaintiff explains his conduct in that respect upon his theory of the situation.

Although there is force in the position of the defense, still we hardly think we should overrule the implied finding of the jury on this point even, and so we therefore feel constrained, all things considered, to allow the verdict to stand.

Motion overruled.

State v. Cape May.

STATE (CAPE MAY, D. B. & S. P. R. CO., Prosecutor)

v.

CITY OF CAPE MAY *et al.**

(*Supreme Court of New Jersey, Nov. 5, 1896.*)

Street Railways—Ordinance Regulating Speed of Cars—Validity.—It is within the authority of a city, under its police power to regulate the use of the public streets, to enact an ordinance limiting the rate of speed at which electric trolley cars of a street railway for the carriage of passengers may be operated in such streets.

Same.—The ordinance will not be set aside unless it be an unreasonable interference with the franchise or privilege conferred upon the street railway.

(Syllabus by the Court.)

ARGUED November term, 1895, before GARRISON and LIPPINCOTT, JJ.

E. A. Armstrong, for prosecutor.

D. J. Pancoast, for defendants.

LIPPINCOTT, J. At a meeting of the city council of the city of Cape May, held on July 9, 1895, the following ordinance was adopted, to wit:

'An ordinance regulating the speed of passenger cars, operated by trolley or electric power in the streets of the city of Cape May.

"Section 1. Be it ordained and enacted by the inhabitants of the city of Cape May, in council assembled, and it is hereby enacted by the authority of the same, that hereafter all passenger cars operated by trolley or electric power within the limits

Case Stated.

of the city of Cape May shall not run at a speed greater than six miles per hour within said city limits.

"Sec. 2. And it is further ordained and enacted that by the authority aforesaid, that every person or corporation offending against the provisions of said ordinance

*See notes at end of case.

State v. Cape May.

shall be subject to, and be liable to pay, a penalty of thirty dollars for each and every violation of the same.

"Sec. 3. And be it further ordained and enacted that this ordinance shall take effect immediately."

The writ of *certiorari* in this case is sued out to review the legality of this ordinance. For the statutes under which the prosecutor was organized as a corporation, reference may be made to the case of Cape May, D. B. & S. P. R. Co. v. City of Cape May (N. J. Sup.) 34 Atl. 397. It is operating in the streets of the city of Cape May as an electric street railway. This ordinance, so far as the procedure of the city council of the city of Cape May is concerned, was passed in the manner prescribed by the charter of the city. The only reason on *certiorari* worthy of serious consideration is that the city council is without legal power to pass an ordinance of this character, affecting the prosecutor, which is a trolley or electric street railway constructed and operated in the streets of that city; or, in other words, it is not within the power of the city to regulate by ordinance, the speed at which cars may run through the streets of that city.

The charter of the city of Cape May (Pub. Laws 1875, p. 206, §§ 19, 20) authorizes the city council to pass ordinances "to regulate the streets and prescribe

the manner in which corporations and persons shall exercise any privilege granted to them in the use of the same; to prevent im-

moderate driving or riding in the streets; and to regulate the running of locomotive engines and railroad cars therein"; also, to provide by ordinance for the protection of persons and property. Section 44 of an act for the incorporation of street-railway companies, and to regulate the same, approved April 6, 1886 (Gen. St. p. 3219), provides that the board of aldermen, common council, or township committee may from time to time establish such reasonable regulations as to the rate of speed and mode of the use of the track as the interest and convenience of the public may require, and enforce the same by lawful penalties. I think that,

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ting Speed of Cars—
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under these statutes, there can be no question of the power of the city council to pass the ordinance in question. It is the exercise of a police power, if without express authority of the charter of the city, yet it can be implied from the power in the public interest to regulate use of the streets of the city. In the case of *Consolidated Tract. Co. v. City of Elizabeth* (N. J. Sup.) 34 Atl. 146, MR. JUSTICE DEPUE declares the general principle to be that "the power of a municipality by ordinance to make reasonable regulations controlling the operation of street-railway companies within the city is undoubted. The franchise granted to these companies to use the streets of the city for railroad purposes affords no immunity from any police control to which a citizen would be subjected. In this case the limitation of the exercise of this police power is discussed. See, also, *Trenton Horse Ry. Co. v. Inhabitants of City of Trenton*, 53 N. J. Law, 132; *North Hudson Co. R. Co. v. Mayor, etc., of City of Hoboken*, 41 N. J. Law, 71; *Booth, St. Ry. Law*, §§ 223, 239; *Halsey v. City of Newark*, 54 N. J. Law, 102. The ordinance in question does not unreasonably interfere with the franchises conferred on street-railway companies by the legislature. *Allen v. Jersey City*, 53 N. J. Law, 522, 22 Atl. 257; *Dry Dock, E. B. & B. R. Co. v. Mayor, etc., of City of New York*, 47 Hun, 221. It being within the power of the city council to regulate their speed in the street, it must be found, in order that the ordinance be set aside, that it was unreasonable, or that it unreasonably interfered with the franchise of the company and the privileges granted it by the city. *Railway Co. v. Steen*, 42 Ark. 321; *Booth, St. Ry. Law*, § 229. The rate of speed fixed by this ordinance would appear to be reasonable and ordinarily considered as one necessary for the fair protection of public travel in the public streets. There appears to be no evidence in the case to show that it is not so considered. The conclusion is that the ordinance is within the exercise of the police power of the city. This ordinance is

Same.

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legislative in its character, and reasonable in its purpose and effect. The proceedings of the city council in its adoption and the ordinance adopted must be affirmed, with costs.

NOTES.

Regulating Rate of Speed.—(See 8 Rap. & Mack's Dig. 676.) In view of the danger to human life occasioned by the rapid moving of cars along a crowded street such regulations cannot be held unreasonable except in the most extreme cases. *Whitson v. Franklin*, 34 Ind 392; *Com. v. Temple*, 14 Gray (Mass.) 69. And it is negligence *per se* not to observe such regulations. *Weber v. Kansas City Cable Ry. Co.*, 100 Mo. 200.

In *Mahan v. Union Depot, etc. Co.*, 34 Minn. 29, it was held that the running of an engine at a speed prohibited by the ordinance was evidence of negligence. See also *Kelly v. Union R., etc., Transit Co.*, 95 Mo. 279; 35 Am. & Eng. R. Cas. 396.

Robertson v. Wabash, etc., R. Co., 84 Mo. 119, holding that a town having power to pass "by-laws and ordinances for the regulation and police of such town," has authority to regulate the speed of railway trains so as to protect life and property.

In *Hanlon v. South Boston Horse R. Co.*, 129 Mass. 310, which was an action against a street railway company for an injury caused by careless driving, the fact that at the time of the injury the car was being driven at a speed prohibited by the city ordinance was held to be evidence of negligence on the part of the corporation, though not conclusive evidence.

A city no doubt has the power, for the protection of its citizens and their property, to regulate the mode of propelling cars within its limits, to say whether steam or horse power shall be employed, and to prescribe the rate at which they may move. *Donnahey v. State*, 16 Miss. 649.

The charter of a city conferred power upon the common council to pass ordinances necessary and proper for the good government, order, and protection of persons and property; also power to prescribe the manner in which corporations or persons shall exercise any privilege granted to them in the use of any street. *Held*, that under either of these powers reasonable regulations controlling the running of street-cars may be adopted. *State v. Trenton*, 53 N. J. L. 132, Atl. Rep. 1076.

State v. Cape May.

STATE (CAPE MAY, D. B. & S. P. R. CO., Prosecutor)

v.

CITY OF CAPE MAY *et al.*

(*Supreme Court of New Jersey, Nov. 5, 1896.*)

Municipal Corporations—Street Railways—Validity of Ordinance.—A city council, under the charter of the city, which confers power upon the council to make ordinances to regulate the public streets, to prevent immoderate driving or riding, to provide the manner in which corporations or persons shall exercise any privilege granted to them in the use of the streets, to regulate the running of locomotive engines and railroad cars therein, and to protect persons and property, is authorized to enact an ordinance that all passenger cars operated by trolley or electric power in the streets of the city shall have proper and suitable fenders on the front of such cars to prevent accident, and that it shall be unlawful to operate such cars in the streets of the city without such fenders.
(Syllabus by the Court.)

ARGUED November term, 1896, before GARRISON
and LIPPINCOTT, JJ. *Dismissed.*

E. A. Armstrong, for prosecutor.

D. J. Pancoast, for defendants.

LIPPINCOTT, J. On the 9th day of July, 1895, the city council of the city of Cape May passed the following ordinance, to wit: "An ordinance requiring the use of fenders on all passenger cars operated by trolley or electric power in the streets of the city of Cape May. Section 1. Be it ordained and enacted by the inhabitants of the city of Cape May in city council assembled, and it is hereby enacted by the authority of the same: That hereafter all passenger cars operated by trolley or electric power in the streets of the city of Cape May shall have proper and suitable fenders on the front of said cars to prevent accidents, and that it shall be unlawful to operate street cars within the city without such fenders." Section 2 provides a penalty

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for a violation of this ordinance, and section 3 provides that it shall take effect immediately. This *certiorari* has been brought to review this ordinance.

The ordinance in this case was passed by the council in the manner prescribed by the city charter. The city charter of the city of Cape May authorizes the city council thereof to enact ordinances to regulate the streets of the city, to provide for the manner in which corporations and persons shall exercise any privilege granted to them in the use of the same, to prevent immoderate driving or riding in the streets, to regulate the running of locomotive engines and railroad cars therein, and such ordinances as they may deem necessary for the good government, order, and protection of persons and property. P. L. 1875, p. 206, §§ 19, 20; Gen. St. p. 312. The prosecutors are operating an electric street railway on the streets of the city of Cape May, under an ordinance granting it that privilege. *Cape May, D. B. & S. P. R. Co. v. City of Cape May* (N. J. Sup.) 34 Atl. 397. It has been held at the present term of this court that ordinances passed by the city council; reasonably regulating the rate of speed at which the prosecutor shall run its cars through the streets, and also to compel it to make full stops before crossing intersecting streets, are valid regulations in the exercise of the police powers implied from the authority granted by the charter of the city to the council. Such ordinances, being reasonable, will be sustained. It is difficult to perceive, in view of the statutory power conferred upon the city council, upon what ground this ordinance can be attacked, as the improper exercise of the power of the regulation of the use of the street for the protection of the traveling public. The franchise or privilege of the prosecutor to operate its cars in the streets of the city is founded upon the grant by the city. The reasonable control of this use of the streets of the city has not been divested by the ordinance under which the railway is operated. The grant was to use the streets with cars of the prosecutor propelled by electric power, a power capable of pro-

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ucing a high and dangerous rate of speed, from which collision would result, perhaps, in probable serious injury to others in the use of the streets. The law is well settled in this state that these street railways have no exclusive use of the streets, and not even the exclusive use of the tracks upon which the cars were operated. The legislative power to control and regulate the streets has been delegated to the governing body of the municipality, and it is under this power that the privilege has been conferred upon the prosecutor, and is still within the power of the city council by invocation of this same legislative authority to so regulate the use of the streets as shall render their use by electric cars consistent with the safety of the general public from accident and injury. The ordinance can be justified only in view of the extraordinary propulsive power by which such cars are operated, and the danger arising from the high rate of speed which may be obtained, and other dangers incident from their operation in the streets and reasonable regulations in the shape of ordinances to protect the ordinary public travel upon the highways have always been supported whenever questions as to the validity of such regulations have arisen. The ordinance under review in matter of principle in no wise differs from ordinances regulating the rate of speed of the cars, or other ordinances owing their origin impliedly to the authority vested in the municipality to regulate the use of its streets. The legislature, when it authorized the use of the public streets for these purposes, was presumed to have intended that the grantee of the franchises should hold its privileges subject to such regulations as were reasonably necessary for the common use of the street for street railway and for ordinary travel. *North Hudson Co. R. Co. v. Mayor, etc., of Hoboken*, 41 N. J. Law, 71; *Consolidated Traction Co. v. City of Elizabeth* (N. J. Sup.) 34 Atl. 146. Nearly all kinds of reasonable regulations can be imposed upon street railways in the use of the streets by the municipality, under the authority granted by the legislature to pass or-

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ordinances to regulate the use of the streets, and such regulations are never declared unlawful on the ground that they impair the franchises of the companies. The power granted to municipal bodies to legislate by ordinances is a grant to a subordinate body, and its legislative acts, when counter to the acts of the state legislature, must give way; but these companies nevertheless hold their franchises subject to such municipal regulations as do not unreasonably interfere with the exercise of the franchises conferred by the legislature. The franchises are exercised upon a public highway, for the public benefit, which highway is acquired and improved for the benefit and advantage of the public at large. The position is different from that of a railroad company exercising its franchises upon a roadbed of its own. The grantee in the former case is subject to municipal regulations of a greater scope in the interest of the public at large than would be justifiable in the case of companies occupying and using their own roadbeds. *Consolidated Traction Co. v. City of Elizabeth* (N. J. Sup.) 34 Atl. 146; *Allen v. Jersey City*, 53 N. J. Law, 522; *Trenton Horse Ry. Co. v. City of Trenton*, 53 N. J. Law, 132; *Booth, St. Ry. Law*, §§ 223-230. Under this power, ordinances regulating the use of the streets by street railways have become frequent, especially so since the introduction of electricity as a motive power, with its capacity for a high rate of speed, as well as other dangerous and obstructive capacities. Their operation must be reasonably safe, reasonably consistent, and in harmony with the legal customary use of the street by the general public; and ordinances to enforce this rule of law are reasonable in purpose and effect. Even direct legislative authority to a street-railway company to carry passengers over the streets of a city does not exempt the corporation from municipal or police control. The principle is a general one that when a business is authorized to be conducted by a corporation within a municipality, the latter presumptively possesses the same right to regulate it that it has over a like business conducted by private per-

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ons. A grant to a corporation of the right to own property and transact business affords no immunity from any police control to which the citizen could be subjected; and a reasonable regulation of the enjoyment of the franchise is not a denial of the right, nor an invasion of the franchise, or a deprivation of its property, or interference with the business of the corporation. The company is presumed to know that the business of operating a city street railway must be conducted under such reasonable rules and regulations as the municipality may impose, and subject to its share of the burdens incident to the conduct of the municipal government. Dill. Mun. Corp. (4th Ed.) § 720; *Trenton Horse Ry. Co. v. City of Trenton*, 53 N. J. Law, 132, and cases cited; *Consolidated Traction Co. v. City of Elizabeth*, *supra*. Ordinances regulating speed, and directing where stops should be made, have been held reasonable (Dill. Mun. Corp. [4th Ed.] § 713; *Hanlon v. Railroad Co.*, 129 Mass. 310; *Booth, St. Ry. Law*, § 229); to compel the removal of earth falling on the track (*Pittsburgh & B. P. Ry. Co. v. Borough of Birmingham*, 51 Pa. St. 41); to compel a company to employ a conductor to assist the driver (*Trenton Horse Ry. Co. v. City of Trenton*, 53 N. J. Law, 132); to keep the street between the rails in repair (*North Hudson Co. R. Co. v. Mayor, etc., of Hoboken*, 41 N. J. Law, 71); to pass such ordinances as may be necessary for the common use of streets for a street railway and ordinary travel (*Id.*). The city can require a greater degree of care on the part of the company in running its cars, as a consideration for granting the franchise, than may be required by law towards one in the ordinary use of the street. *Fath v. Tower Grove Ry. Co.*, 105 Mo. 537. Ordinances to compel the cleaning and sprinkling of tracks have been frequent, and their validity sustained. Cars can be required to be run at certain hours, and at fixed intervals; and the corporation can be required to remove snow from the streets. *Broadway & S. A. R. Co. v. City of New York*, 49 Hun, 126. Ordinances have been upheld

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prohibiting the use of salt or saltpeter or salt of any character on the tracks. Consolidated Traction Co. v. City of Elizabeth, *supra*. The use of sand on the tracks can be prohibited by ordinance. Dry Dock, E. B. & B. R. Co. v. Mayor, etc., of New York, 47 Hun, 221. An ordinance has been held valid which prevented cars driven in the same direction from approaching within 300 feet of each other. Bishop v. Railroad Co., 14 R. I. 214. The dangers created by the use of electricity as a propulsive power of street railways of necessity creates a new department of police regulations. The use of an agency so dangerous as electric power is a proper subject for the exercise of police control, for the purpose of obviating danger, so imminent even in its most careful use. The ordinances which confer the right to construct electric railways in the public streets carefully guard the method of construction, whenever it is important for the protection of public or private interests to do so. Kennelly v. Jersey City, 57 N. J. Law, 292. Such regulations may be contained in the grant of the privilege to use the street for the purposes of an electric street railway, as conditions annexed to the grant; but their absence there does not prevent the municipality from their subsequent enactment, if they be reasonable for the protection to the ordinary use to which the highway is lawfully devoted, and on the proper exercise of the general power of the state, conferred upon a subordinate political body, to protect the lives and property and promote the welfare of its citizens, and all other persons, natural or artificial, who have the right to claim the protection, in these respects, of the law. The maxim, "*Sic utere tuo ut alienum non laedas*," is quite applicable to a street railway operated by electric power in its use of the streets of a city; and ordinances enforcing the doctrine are not only valid, but salutary, as an exercise of municipal regulation.

The construction of the road and its equipment would seem reasonably to be a subject of municipal control, when, as in this case, there is nothing in the

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legislative grant to construct and maintain the street railway, which forbids such control, and where, as in this case, the charter of the city confers power upon the city council by ordinance not only to regulate the use of the streets, but to prescribe the manner in which corporations and persons shall exercise any privilege in the use of the same, and empowers them to make and establish such ordinances as they may deem necessary and proper for good government, for the maintenance of order, and the protection of persons and property. An ordinance requiring splices on electric lines to be insulated was declared a valid exercise of municipal control. *Clements v. Electric Light Co.* (1892) 11 South. 51. An ordinance providing guard wires in the operation of an electric street railway, where several electric wires crossed each other and hung at different heights, was sustained as a reasonable exercise of the police power, under statutes conferring the right of regulation of the use of the streets. *State v. Janesville Street Ry. Co.* (1894) 57 N. W. 970. It must, at this day, be conceded that municipal authorities having the regulation of the use of streets have the power to pass all ordinances to reasonably guard and secure ordinary public safety and convenience, whether in relation to the construction of the road or its equipment. Ordinances to regulate street railways, when reasonable, are valid. *State v. Madison St. R. Co.*, 72 Wis. 612, *State v. Hilbert*, 72 Wis. 84. What can be more reasonable and necessary for the protection of the ordinary travel and use of a street than that an electric car, capable of being driven at a high rate of speed, should have attached guards of some kind or other against accident and injury. The test is whether it is reasonably designed to guard some public or private right from threatened injury from the operation of these cars. *Tied. Lim.* 597-599. Upon reason and authority, this ordinance is justified as an exercise of reasonable municipal or police power in behalf of the protection of the public engaged in ordinary business or travel upon the streets of the city.

Notes.

The precise kind of fender is not regulated by this ordinance, but it is neither uncertain nor unreasonable because of this. The term "fender" is well defined and readily understood as a guard and protection against danger, and it is left to the prosecutor using a reasonable discretion, and without trick or evasion, to supply a proper and reasonable device to satisfy the plain meaning of the ordinance. The object of the ordinance can be easily effectuated; nor is there anything in the ordinance to prevent the prosecutor, from time to time, from changing a fender once adopted to one more suitable and one more effectual in subserving the purpose of the ordinance. But a *bona fide* reasonable observance of this ordinance is required by reason of its being a legal exercise of the power of municipal control, and it is not an invasion of the franchise of the prosecutor, nor an interference with the operation of its street railway or its business. It is a regulation at the same time reasonable, necessary, and salutary, and entirely within the power of municipal control, vested in the city council of the city, and the proceedings thereof in the adoption of this ordinance, and the ordinance also, must be affirmed, with costs.

NOTE.

Municipal Regulation and Control of Street Railroads.—See 23 Am. & Eng. Ency. of Law, 998; Notes 26 Am. & Eng. R. Cas. 537; 13 Id. 637, 50 Id. 437; 8 Rap. & Mack's Digest, 437.

New Jersey Elec. Ry. Co. v. Miller.

NEW JERSEY ELECTRIC RY. CO.

v.

MILLER.

(Court of Errors and Appeals of New Jersey, March 9, 1897.)

Street Railway Crossings—Right of Way.*—Upon a request to charge "that it is the duty of a driver approaching the line of a street-railway company, where his view is impeded by vehicles, so that he cannot see up the track, to wait till he reaches a point where his sight is not impeded, before going on the track," the trial judge instructed the jury that "he ought to be able to see far enough up the track to see that he has the right of way; and he has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of speed." *Held*, that he should, in effect, have charged that the driver would have the right of way if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he should reach the point of crossing in time to safely go upon the tracks in advance of the approaching car; the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach him.

LIPPINCOTT, MAGIE, BOGERT, DAYTON, and HENDRICKSON, JJ., dissenting.

(Syllabus by the Court.)

ERROR to Passaic county circuit court. *Reversed*.

Eugene Stevenson, for plaintiff in error.

John W. Harding, for defendant in error.

MCGILL, CH. This was an action for damages occasioned by a collision between a trolley car and a wagon driven by the plaintiff below, which resulted in the plaintiff's being thrown to the ground, and injured. The plaintiff drove easterly through Ward street, which opens into and terminates at Railroad avenue, in the city of Paterson, and, upon reaching Railroad avenue, drove into it, and upon the tracks of the New Jersey Electric Company there located, purposing to turn and drive along Railroad avenue, when the col-

**Street Railways—Right of Way.*—See 8 Rap. & Mack's Digest 510.

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lision occurred. The judge charged the jury that it was entirely plain that the plaintiff below had the right of way across the trolley track as he drove out of Ward street upon Railroad avenue, and that the motorman knew, or was bound to know, that the plaintiff had the right of way if he chose to go on across the track. He also charged that both the plaintiff below and the motorman were bound to exercise reasonable care to prevent a collision, and that, if the jury should find that the plaintiff had contributed to the accident by his negligence, he could not recover. The effect of these propositions, taken together, was to lead the jury to the implication that in proceeding to use the right of way, which the charge conceded to him, the plaintiff was not guilty of negligence. The defendant's counsel was not satisfied with the court's assumption of the fact that the plaintiff had a right of way, which he might use without being guilty of negligence, and in order that the jury might pass upon the question whether he had such right, as a question of fact, he requested the court to charge as follows: "That it is the duty of a driver approaching the line of a street-railway company, where his view is impeded by vehicles, so that he cannot see up the track, to wait till he reaches a point where his sight is not impeded, before going on the track." To this request, the judge charged: "He ought to be able to see far enough up the track to see that he has the right of way, and he has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of speed." In this definition, the auxiliary verb "can" denotes possibility, and the import of the definition is that if, by the quickening of his speed, the driver may be able to reach the crossing before the electric car, if the car should proceed at a reasonable speed, he would have the right of way, in the lawful use of which, as the jury was led to imply in the previous charge, he would be free from negligence. In other words, we think that the jury was given to understand that if the driver of a vehicle, in approaching a trolley crossing in

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a highway, could, by activity, reach the crossing before the car, if the latter should be run at reasonable speed, he would have the right to proceed upon his way, without being guilty of negligence. The possibility of the acquirement of a superior right by activity is the vicious element in the proposition. Its import is inconsistent with that deliberate exercise of reasonable care which the law requires. It is true, the judge had previously, in his charge, said that the driver must exercise reasonable care; but that part of the charge was not referred to in the special disposition of the request, to qualify the proposition of the judge. We think that the proposition should, in effect, have been, that the driver would have the right of way if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he should reach the point of crossing in time to safely go upon the tracks, in advance of the approaching car; the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach him. In the particular indicated, an error injurious to the defendant below was committed. There must be a *venire de novo*.

LIPPINCOTT, MAGIE, BOGERT, DAYTON, and HENDRICKSON, JJ., dissent.

Culbertson v. Crescent City R. Co.

CULBERTSON

v.

CRESCENT CITY R. CO.

(Supreme Court of Louisiana, April 6, 1896.)

Street Railways—Injury to Infant—Contributory Negligence.—The fact that a child may not be capable of contributory negligence does not always render the defendant liable upon the mere proof of the act causing injury.

Same—Sudden Act of Child—Liability of Railway Company.—No liability for sudden act of a child.

Same.—If the defendant's employee was not careless or negligent, it cannot be rendered liable.

(Syllabus by the Court.)

APPEAL from parish of Orleans civil district court.
Reversed.

Farrar, Jonas & Kruttschnitt, for appellant.

O. B. Sansum, for appellee.

BREAUX, J. The plaintiff sued the defendant to recover damages for killing his son James, at the upper crossing of Soraparu street, on the night of Sunday, July 7, 1895, at 9 o'clock. The boy was six years and eleven months old. The plaintiff says: That his son was standing on the car track, plainly within view. The car moved slowly down. The projecting fender struck him, and threw him across the fender frame; and from it, by the car's motion, he was thrown to the track. The fender passed over him, and forced his body under the cars, causing almost instant death. That the motorman of defendant's car knew nothing of the accident until some one near from the street shouted to him that there was a child under the car. That the motorman did cut off the power, and applied the brakes, stopping the car within 20 feet from the point at which he thus applied

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the brakes. The complaint further is : Had the motorman looked down the street, he could have seen the child in time to prevent the accident ; that he was not watchful and attentive ; that he failed to ring the gong. The defendant denies that its employee was guilty of negligence. The jury found a verdict for plaintiff in the sum of \$1,500. From the verdict and judgment, the defendant appeals.

This is another of the sad accidents the cause of which this court is called upon to investigate, and to familiarize itself with the facts, in order to determine if damages are due. The questions are principally of facts, and no controversy in regard to the law arose in argument at the bar. We take up the review of the facts (the incidents as they happened) according to the order of time. The gong was sounded and the alarm given as the car came down Chippewa, approaching the corner of Soraparu street. The motorman and the conductor were at their respective places, and the former had the electric power and the car brakes under his control.

We set forth the details of the occurrence as near the language of the witnesses as possible, in view of the fact that some brevity and conciseness are required.

Witnesses for the plaintiff : The first who says he saw the accident (Hyland) was about three-fourths of the way on Chippewa, walking up from Philip towards Soraparu street. The boy was standing on the uptown side of Soraparu street, near the track, and the car, descending, at the time was about 100 feet from the corner. He says : "He was close to the track. I could not state positively whether he was on the track or in the middle of the track or not. I know he was between the banquette and the track. He was in that neighborhood close to the track. Q. Do you know that he jumped on the track ? A. I don't know whether he did or not." Again he states : "Saw the child moving ; could not state positively in what direction." "He may have run across before my attention was directed to him." He says he was struck by the fender. The

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companion of this witness, Murphy, who was walking and talking with him at the time, cannot say whether the boy was standing on the car track, between the rails, or near the car track. The first witness, Hyland (with whom he was, as just stated), said nothing to him when he (Hyland) says he saw the boy as he was struck by the fender, and dragged. This last witness, Murphy, states that he had no intimation that anything had happened before he saw the car stop, and everybody run to it. Another witness, Mrs. Nelson, saw the little boy standing on the little bridge over the small gutter, and afterwards saw the fender strike him.

Witnesses for the defendant: About the only testimony of any value of the first witness is that she heard the car bell ringing and giving the alarm at the moment of the accident. The second witness was sitting about 30 feet from the place of the accident, and was looking in the direction to which the child was running. He thought the child had collided with the side of the car. Upon discovering that he had not, he gave the alarm. The car was stopped within 20 feet, and the child's body removed from under the car. He answered: "Did the bell of the car ring before it got to this corner? A. Yes, sir. Q. And the motorman couldn't have seen the child in time to stop the car before the accident? A. Surely not." Another witness, Miss Birmingham, was talking with Mrs. Nelson, and looking in the direction of the accident with Mrs. Nelson, and saw the boy cross over to the track. He appeared to be running after a dog. "He was standing on the Chippewa street side, and ran in the direction of his home, over towards Annunciation, and then appeared to be knocked down by the fender. Q. Did you see the fender knock him down? A. No, sir; I saw him pass the front, and I suppose the fender must have knocked him down." Again, at another time, while testifying: "Q. Was the boy running or walking? A. He was standing until the car came, and he ran across. Q. Could the man have seen him? A. No, sir; couldn't have seen him." Another witness, Caroun, observed

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the boy playing between the rails, and at times near the crack. Caive, also a witness, says that the alarm was sounding at the time. Another witness, Gitz, knows nothing having any bearing upon the issue save that he heard the ringing of the bell before the car came to the corner. The motorman and the conductor substantially testify that everything was done to prevent the accident; that the boy darted in front of the car; and that the motorman quickly stopped the car.

After as careful and close an analysis of the evidence as it was possible for us to make, we think that the weight of the testimony is with the defendant. Plaintiff's theory, that the little boy was standing on track, between the rails, and that the motorman ought to have seen him, is not sustained by the evidence of his own witnesses. They do not testify with any degree of certainty where he was just preceding the accident. The witnesses for the defendant agree in stating that he was not on the track, and that the accident was occasioned by the sudden act of the child. Granted, as contended by the plaintiff, that the motorman did not see the child before he was knocked down by the defender, if the child had escaped his attention because of his sudden and unanticipated act itself, it becomes evident that the defendant is not liable. Whether he was seen or was not seen by the motorman would not render the defendant responsible if, owing to thoughtless impulse of the child, he brought about the accident by a sudden act, which could not be foreseen or guarded against by the motorman or any one else in charge of the car.

This brings us to the question of contributory negligence. Courts are averse to finding children guilty of contributory negligence, and are readily and properly inclined to disregard the thoughtlessness and heedlessness natural to boyhood; but accidents may happen for which the unconscious agent may not be responsible. The fact that a child may not be capable of contributory negligence does not always render a defendant liable upon

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the mere proof of the injury. The test is negligence *vel non*. If the defendant or the defendant's agent or employee was not negligent, it is not liable. The only alternative after the conclusion reached is to set aside the verdict. The verdict and judgment are reversed, annulled, and avoided. The demand of plaintiff is rejected, and his action dismissed, at his cost in both courts.

Same—Sudden Act
of Child—Liability
of Railway Com-
pany.

SCIORTINO

v.

CRESCENT CITY R. CO.*

(*Supreme Court of Louisiana, Nov. 16, 1896.*)

Injuries to Child on Track—Liability.—This case involves only a question of fact. The defendant's car injured a child of tender years on its track, and there was an entire absence of negligence on the part of defendant's employees. The accident was unavoidable.

(Syllabus by the Court.)

APPEAL from parish of Orleans civil district court.
Affirmed.

Benjamin Rice Forman and Benjamin Rice Forman, Jr., for appellant.

Farrar, Jonas & Kruttschnitt and Hewes T. Gurley, for appellee.

MCENERY, J. The plaintiff brought this suit to recover of defendants the sum of \$10,000 damages for the use and benefit of his minor child who was injured by defendant's car. The child was 18 months old when the injury was inflicted. He was on defendant's

*Rehearing denied January 4, 1897.

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track. The car was going at the rate of 5 miles an hour. It was 40 feet from the child when it was discovered that the child was on the track. It is in evidence that an electric car going at that rate of speed cannot be checked or stopped at less than that distance. The testimony is that the motorman did everything in his power to avoid injuring the child after he saw it on the track. A passenger in the car gives the most satisfactory account of the efforts of the motorman to stop the car. There is no contradiction of his testimony. The mother and brother of the child attribute the accident to the fact that the motorman was not looking "straight down," or he would have seen the child in time to avoid the accident, but they say he was looking forward, which was the proper direction for him to view the track. The motorman saw the child about as soon as it was practicable for him to do so, which was about the time the mother saw the child on the track and screamed to the motorman to stop. We are satisfied that the defendant company was in no way negligent, and that the accident was unavoidable. Judgment affirmed.

Pittsburg, &c., Ry. Co. v. Sheppard.

PITTSBURGH, C., C. & ST. L. RY. CO.

v.

SHEPPARD.

(Supreme Court of Ohio, Feb. 2, 1897.)

Carriers—Exemption from Liability—Validity.—It is the settled law of this state that a common carrier cannot, by special agreement, relieve himself from responsibility for his own negligence, nor limit his liability for losses resulting therefrom.

Laws Governing a Contract.—A contract made in one state or country, to be performed in another, is governed by the laws of the latter, which determine its validity, obligation, and effect.

Same.—Where a railroad company receives live stock in another state, under a contract there made, to transport it to a designated place in this state, and, while the stock is being carried in this state, it is injured by the company's negligence, the rights of the parties, in an action for damages for the loss, are governed by the laws of this state, and not by those of the state where the contract was made.

Injury to Stock—Evidence of Value.—In an action to recover the value of a trotting horse, evidence of his pedigree, and that some of his blood relations have a record for speed, is competent as affecting his value.

Same—Admissibility.—When such record is published by authority of a recognized trotting association, and the publication is accepted and acted upon by those interested in and conversant with such matters, as authentic and official, it is not error to admit evidence of the speed as shown by that record, but the testimony of a witness to information he claims to have obtained from the record is incompetent.

Opinion of Expert—Competency.—One who for 10 years has made car building his business, and given special attention to car wheels and their construction, is competent to give an opinion of the value of the hammer test as a means of discovering defects in car wheels.

(Syllabus by the Court.)

ERROR to Franklin county circuit court. Reversed.

Action by Harry D. Sheppard against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Sheppard delivered to the Terre Haute & Indianapolis Railroad, at Lovington, in the state of Illinois, a car load of horses which that company agreed to transport over its line to Indianapolis, Ind., and there deliver them to plaintiff in error for

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carriage to the city of Columbus, Ohio. The contract with the former company is in writing, and contains a stipulation that, "in case of any loss or damage, the liability of said company and of any connecting line shall not exceed \$100 per head." The horses were safely delivered to the plaintiff in error, at Indianapolis, and received by it in good condition; but, while being transported over its line in this state, a defective wheel of one of the cars in the train gave way, in consequence of which one of the horses was killed, and the others were injured. Sheppard brought suit in the court of common pleas of Franklin county against the plaintiff in error for damages, alleging that his loss was occasioned by the company's negligence. The company denied negligence on its part, and pleaded the stipulation in the contract, above set forth, as a limitation on its liability, averring that the contract was made in the state of Illinois, where, under the law of that state, such stipulation is valid. Issue was joined on the allegations of the answer, and on the trial evidence was given by both sides tending to prove what the law of Illinois on the subject was when the contract was made. The plaintiff recovered more than the amount limited by the contract, and that judgment was affirmed by the circuit court. The railway company prosecutes in error here to obtain the reversal of both judgments. A further statement of the facts pertinent to the questions raised will be found in the opinion.

Watson, Burr & Livesay and *F. M. Sackett*, for plaintiff in error.

J. W. Mooney, for defendant in error.

WILLIAMS, C. J. (after stating the facts). It is not contended there is sufficient ground for disturbing the judgments below, for lack of evidence tending to prove that the negligence charged against the defendant was the cause of the plaintiff's loss; but it is claimed the evidence did not establish gross or willful negligence, and that under the law of Illinois, where the contract for the transportation of the horses was made, it was com-

Carriers—Exemption from Liability—Validity.

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petent for a common carrier of goods to limit his liability, by special agreement, except as against his negligence of that character. And the principal contention of counsel for the plaintiff in error is that the trial court erred in its charge concerning the law of Illinois on that subject; the complaint being that the charge, in substance, was a statement of the rule established in this state, instead of that which obtains in Illinois. The parties put in evidence several decisions of the supreme court of that state to prove the law of the state, and counsel in argument seek to maintain different interpretations of those decisions favorable to their respective clients. But if the rights of the parties are to be determined by the laws of this state, and not by those of Illinois, the charge was not erroneous or prejudicial, though given as the law of that state. There is nothing to show that any traffic arrangement existed between the two railroad companies, nor any agency or authority of one to contract for the other; and assuming that the plaintiff in error, by accepting the horses from the other company, and undertaking to transport them over its line, became a party to the contract with the plaintiff below, it did so at Indianapolis, and its contract was to carry the horses from that point to their destination. No part of its performance of the contract was to take place in the state of Illinois; and, if the carriage of the property over that part of its road which is located in Indiana could be considered as a performance having the effect of making the rights of the parties under the contract subject to the laws of that state, none differing from that of this state was pleaded or proven, and there is no presumption that they were different.

But, if the law of Indiana were shown to be the same as that of Illinois is claimed to be, it would not be the law governing this contract. We understand the rule to be that where a contract is made in one state, to be performed in part in another, and an action is brought for a breach of that part of the contract, the rights of the parties must be determined according to the law of the

Law Governing a
Contract.

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atter state. Story, Cont. § 655; Barter v. Wheeler, 49 N. H. 9. But, however that may be, it is apparent from the face of this contract that it was to be performed in this state. The property was to be transported to Columbus, where the consignee was entitled to receive it from the carrier. The latter was bound to deliver it at that place. The contract could be performed by the company nowhere else. Carrying the property through a portion of the state of Indiana did not constitute performance. That was merely a means of enabling the company to perform by delivery of the property at its destination. And, the contract being silent as to the time and place of payment of the freight, it was payable at the time of the delivery of the property to the consignee, and necessarily at the place of delivery; so that the place of performance by both parties to the contract was in this state. And the rule is that, when it appears from a contract made in one state or country that it is to be performed in another, the presumption is that it was entered into with reference to the laws of the latter, and those laws determine its validity, obligation, and effect. *Kanaga v. Taylor*, 7 Ohio St. 142. Other cases on this subject are largely collected in the briefs of counsel. It is also the well-settled law of this state that a common carrier cannot by special agreement relieve himself from the consequences of his own negligence, nor limit his liability for losses resulting therefrom. This rule is laid down in *Welsh v. Railroad Co.*, 10 Ohio St. 65, as follows: "A railroad company, acting as a common carrier of live stock, cannot, by special contract, procure exemption from responsibility for losses arising from its own neglect of the duties incident to such employment. Such common carrier is liable for damage resulting from defective and unsafe cars or vehicles of transportation, notwithstanding an express contract to the contrary." And see *Davidson v. Graham*, 2 Ohio St. 132; *Graham v. Davis*, 4 Ohio St. 362; *Railroad Co. v. Curran*, 19 Ohio St. 3; *Railroad Co. v. Pontius*, Id. 221; *Knowlton v. Railroad Co.*, Id. 263; *Express Co.*

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v. Backman, 28 Ohio St. 144 ; Express Co. v. Schwab, 53 Ohio St. 659.

We find no error in the charge of the court that could operate to the prejudice of the defendant below.

One of the animals injured while in transit over the defendant's road was a mare called Mora, and the plaintiff was allowed to give evidence of her pedigree, showing her blood relationship to the celebrated trotting horse Jay Eye See and other noted horses. This evidence was

Injury to Stock—
Evidence of
Value.

objected to by the defendant, and the objection here urged against it is that it was too remote. But the pedigree of a horse usually enters into the estimate of its value, and that of horses kept for racing purposes is considered of importance among dealers in horses of that kind ; and we think the evidence was competent as affecting the value of the mare.

For the purpose of proving the speed of Jay Eye See and other horses to which Mora was related, in trotting and pacing, the plaintiff was permitted to testify to information he obtained from the annual reports of the American Trotting Association, which, it appeared, keeps a record of extraordinary speed made by horses at races held under authority of recognized racing organizations, and that record is issued by the association in published volumes which are accepted and acted upon by handlers and dealers in trotting, pacing, and running horses, and persons interested in that kind of stock, as the authentic and official record of the speed shown by noted horses. The defendant objected to this testimony, particularly to that purporting to be information obtained by the witness from the published record. There would seem to be no serious objection to evidence of the fact that the horses had a record for extraordinary speed, nor to proof of that fact by the production of the record. It might be impracticable, if not impossible, to prove the speed of a horse by eyewitnesses of the races, especially after the lapse of long time. If such witness were called, he could scarcely do more

Same—Admissibility.

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than testify to the speed as that was announced by the judges, or as shown by the published account; and it would become necessary for the witness to refer to the record kept by those in charge, or published under their authority. And when that record is published by such authority, and as so published is accepted and acted upon by those interested in and conversant with such matters, as authentic and official, we see no reason why it may not be admissible whenever the original would be. The fact that there is such published record, so acknowledged and recognized, enters into the estimation of the value of the horse, and that of his descendants and relatives among dealers in horses of that kind. The speed of the horse, if that were not generally known, might not be so important as affecting the value. But, while such evidence was admissible, it was clearly incompetent for the witness to testify to information which he claimed to have obtained from reading the record as published by the trotting association; and for this error the judgments below must be reversed.

Another question made relates to the qualification of a witness by the name of Cox, who was permitted to give an opinion on the value of the hammer test as a means of detecting breaks in car wheels. The witness testified that he had been engaged in the business of building railroad cars for 10 years, and during that time had given particular attention to car wheels and their construction. The testimony was competent. Its weight was for the jury. Judgment reversed.

*Opinion of Expert—
Competency.*

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CHICAGO, B. & Q. R. Co.

v.

GARDINER *et al.*

(Supreme Court of Nebraska, March 17, 1897.)

Instructions—Harmless Error.—An instruction which, though technically inaccurate in some respects, nevertheless correctly states the principles really involved, *held* not prejudicially erroneous.

Limitation of Carrier's Liability—Conflict of Laws.—A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this state, though valid in the state where made, when such attempted restriction of liability is illegal, and contrary to the public policy of this state.

(Syllabus by the Court.)

ERROR to Adams county district court. *Affirmed.*

A. W. Agee, J. W. Deweese, and F. E. Bishop, for plaintiff in error.

J. A. Gardiner and J. B. Cessna, for defendants in error.

RYAN, C. This action was brought in the district court of Adams county for the value of a horse alleged to have been injured, so as to have been rendered worthless, on the line of railway of plaintiff in error,

while in transit between Peoria, Ill., and Hastings, in this state. There was a verdict against the railroad company in the sum of \$650. To reverse the judgment thereon rendered, the railroad company has prosecuted this proceeding in error. The matters in defense will now be separately considered.

The contract of shipment provided that, in cases where no rate was expressly inserted therein, the value of each horse was agreed to be \$100, and in this connection was the following language: "And that the

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above rate of transportation is based upon the agreement that in case of loss or damage, whether resulting from accident or negligence of said railroad company or its servants, said railroad company does not assume a liability for such loss or damage to exceed the valuation of each animal." There was a further provision that, in case of damage sustained, a written claim therefor, verified by affidavit, should be presented to the railroad company's general freight agent at Chicago, or to the station agent, in this instance at Hastings, within ten days after the removal of the animal from the car in which it had been shipped. There was evidence of an oral notice of the character above indicated, within the time fixed, to the local agent at Hastings, through whose procurement an examination was at once made of the condition of the horse, and thereupon immediate steps were taken by the railroad company for the relief of the injuries which the horse had sustained. It was not shown that, if there had been a technical compliance with the terms above prescribed, there would have been taken any other steps than those which were taken. Under these circumstances, we do not think that the failure to give a written notice based upon an affidavit was an indispensable condition precedent to a right of recovery. *Railroad Co. v. Brown* (Ill. Sup.) 30 N. E. 273.

Plaintiff in error contended by its answer in the district court, as it does in argument in this court, that, by the decisions of the courts of Illinois introduced in evidence, the restriction of the liability of a common carrier to the value fixed in the contract of shipment was enforceable in that state, and consequently should be enforced in this state. In *Railroad Co. v. Witty*, 32 Neb. 275, there were under consideration very much the same circumstances as are now under consideration, except that there was in that case no averment or proof as to the law of Illinois being different from that of Nebraska with respect to the right of a common carrier, by contract, to limit its liability for negligence.

Limitation of
Carrier's Liability—
Conflict of Laws.

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It was held that no such restriction could be made under the laws of this state, and this ruling has been followed and approved in *Railroad Co. v. Lawler*, 40 Neb. 357. The question now presented is whether or not our conclusion thus announced should be held to be subject to a modification on account of the alleged difference between the laws of Illinois and those of Nebraska. The defendant in error, to show that there is no difference between the holding of the courts of Illinois and the holding of this court in *Railroad Co. v. Witty*, *supra*, in the respect indicated, offered in evidence, among other language of the appellate court of Illinois, that found on page 523 of the case of *Railroad Co. v. Chapman*, 30 Ill. App. From this language offered in evidence, we quote the following: "We hold that while common carriers cannot, under the law, be permitted to fix arbitrarily the prices on freight they ship at prices below the real value, without the full, free, and voluntary consent of the shipper, fairly and understandingly entered into, and with the purpose of fixing its value, yet we also hold that common carriers have a lawful right to demand and require of the shipper a correct and honest statement of the actual value of his merchandise, and to insert such value in the bill of lading, and then to charge the shipper a just and reasonable compensation, in proportion to the risk they assume in transporting his property. By such value, when so fixed, the shipper should be bound in case of loss or injury to his property, although the carrier might show the property to be of less value than stated by the shipper. Such a rule would be reasonable and just to both parties. There is no hardship in the law requiring common carriers to demand a correct and truthful statement from shippers of the real value of their property; nor is there any hardship or injustice in requiring the shipper to pay a full and fair compensation to have his merchandise shipped in proportion to its value." The defendant in error also offered in evidence page 418 of the case of *Railway Co. v. Chapman* (24 N. E.), which we take to be the same case decided by the appellate

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court from the opinion in which the above quotation was made. On the page of the Northeastern Reporter offered in evidence, we find this language of the supreme court of Illinois: "By the strict rule of the common law, the carrier was liable for injuries resulting from causes beyond his control, and which were not the result of his act or the omission of his duty; the exception being that he was not liable for injury or loss resulting from the act of God or the public enemy. Thus, he must account for goods received for transportation, even though they be destroyed by fire without his fault. The rule has generally been so far relaxed that the carrier may, by special contract, exempt himself from this strict liability imposed by the common law; but the weight of authority, in our judgment, holds as this court has uniformly held, that he may not exempt himself from liability for damages resulting from the gross negligence or willful misconduct of himself or of his servants. The law does not authorize common carriers to fix arbitrarily the value of goods delivered to them for transportation, and thereby limit their liability in case of loss. If a value should be fixed by the carrier as before stated, and the contract of shipment was based thereon, the amount thus fixed would ordinarily fix the liability of the carrier." The syllabus of the case from which the above quotation was made was introduced in evidence. It was as follows: "A common carrier cannot, by contract, limit its liability for injury to property during transportation caused by its gross negligence." Section 4, art. 11, entitled "Railroad Corporations," in our constitution, contains this language: "The liability of railroad corporations as common carriers shall never be limited." In this state, therefore, the liability of railroad corporations is that of common carriers, which may not be limited by the courts or by the legislature. A comparison of the language above quoted, as having been introduced in evidence in this case, with that of NORVAL, J., in *Railroad Co. v. Witty*, *supra*, and with the above constitutional provision, indicates very clear-

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ly that the courts of Illinois do not hold railroad corporations to the strict liability of common carriers enforced in this state.

On request of the defendant in error, the district court gave the jury the following instruction: "The court instructs the jury that the defendant cannot limit its liability by contract for negligence, but that it is liable for all damage resulting from its carelessness or negligence in the transportation of said stallion by defendant as a common carrier. The fact that this contract was made in the state of Illinois makes no difference, for the reason that the law and decisions of the supreme court of that state are similar to the law and decisions of the supreme court of Nebraska, upon the principles that are given in this case. That in neither state can a common carrier limit his liability, either by express contract or otherwise, against negligence or the use of reasonable care and diligence. Therefore, the plaintiffs are entitled to recover the full value of said stallion at what he was worth when he was shipped; provided that you believe that, while he was being shipped over the railroad of the defendant, he received injuries resulting in his death, from the carelessness or negligence of said railroad company in his transportation." The court, it seems to us, erred in giving the construction which he did to the opinions of the courts of Illinois which had been offered in evidence, for in each of these there was distinctly recognized the right to limit by contract the liability of the carrier, under certain conditions, to the value stated in the shipping bill. This is in direct conflict with the views of this court as expressed in the Witty Case. The recovery was in the sum of \$650, while the value fixed in the shipping bill was about \$100, so that we cannot avoid the conclusion that the jury was controlled by the instruction quoted. Again, there seems to be a difference held with respect to the degree of negligence which may be contracted against, which difference was not noted by the district court. Among these misapprehensions, however, there were recognized the controlling principles re-

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ognized in this state that a common carrier cannot limit its liability for negligence, and that the value of the horse as it was proved, and not as stated on the shipping contract, must govern the amount of the recovery. Since these two propositions correctly embody the law of this state, the verdict should be sustained, notwithstanding the errors noted in the instruction, unless, as plaintiff in error contends, the law of Illinois must prevail. Ordinarily, the law of the place of shipment should be held to be the law with reference to which the shipper and carrier have contracted, in the absence of direct evidence of an intention to be governed by some other rule. The cases cited by the plaintiff in error, for our present purposes, may be conceded to establish this proposition. As a general rule, the proposition may be also accepted as correct that, where parties in good faith have entered into a contract valid and binding in the state where made, it will be enforced in another state. This enforcement is a matter of comity, however, and not of absolute right. As was said by CHIEF JUSTICE TANEY in *Bank v. Earle*, 13 Pet. 519: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and it is inadmissible when contrary to its policy or prejudicial to its interests." To the same effect is the language of Story,— "that no state will enforce a foreign law if it be "repugnant to its policy or prejudicial to its interests." Story, *Confl. Laws*, § 38. The restrictions under which comity between states should be allowed to control were very fully discussed in *Armstrong v. Best* (N. C.) 17 S. E. 14, wherein the above quotations will be found. In Massachusetts the liability of common carriers has been permitted by contract to be restricted with respect to interstate commerce, as and perhaps more uniformly than in any other state, but this restriction has always been conditioned that the contract creating it must be neither immoral nor illegal, tested by the law of that commonwealth. *Fonseca v.*

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Steamship Co., 153 Mass. 553; *Greenwod v. Curtis*, 6 Mass. 358; *Milliken v. Pratt*, 125 Mass. 374.

It may be of advantage to illustrate the application of this rule by the use of adjudicated cases not treating of or involving the liability of common carriers. In *Oscanyan v. Arms Co.*, 103 U. S. 261, there was involved the right of a Turkish consul to recover a commission agreed to be paid to him for recommending to his government certain supplies. This agreement, not enforceable in the United States, was valid in Turkey; yet the principle of comity was held insufficient to overcome the repugnance with which such a transaction is viewed in this country. The syllabus of *Lemonius v. Mayer* (Miss.) 14 South. 33, is as follows: "Act March 7, 1882, entitled 'An act to prohibit the purchase and sale of "futures" in the state of Mississippi (Acts. 1882, p. 140), § 1, made it unlawful to deal in contracts commonly called 'futures' in this state; and prescribed a punishment for dealers therein. Section 2 provided 'that no money advanced for the purchase of futures, nor any agreement for the payment of any sum for such purchases, shall be enforced in any court in this state.' Held, that the contracts between purchasers of futures and their brokers, made without the state, while such statute was in force, cannot be enforced in Mississippi, though valid where made." In *Dammert v. Osborn*, 35 N. E. 1088, it was held by the New York court of appeals as follows: "Where the courts of this state cannot give effect to testamentary dispositions of personal property in foreign wills without violating the laws or public policy of the state, the property should be remitted to the jurisdiction of the domicile, to the end that it may administer its own laws; but, if there is no law or public policy here that forbids the execution of the purpose that the testator had in view, then the courts of this state will give effect to the disposition according to the law under which it was made." In *Sheldon v. Blanvelt* (S. C.) 7 S. E. 593, *Blanvelt*, a citizen of New York, had executed a general assignment for the

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benefit of his creditors, providing for the payment of all wages and salaries of his employees, in preference to all other creditors, as required by the statute of New York. The assignment was executed and recorded in all respects as required by the statutes of that state. The principal part of the assignor's property was in New York, though he owned some real estate and personal property in South Carolina. Before possession of the property in South Carolina had been taken by the assignee, it was seized by virtue of writs of attachment, sued out at the instance of creditors residing in New York and Connecticut. A statute of South Carolina provided that any assignment for the benefit of creditors made by an insolvent debtor, containing a preference of one creditor over another, should be absolutely void. It was held that the deed of assignment was void so far as the property located in South Carolina was concerned, and that it was immaterial that none of the attaching creditors resided in that state. In the United States district court of the Southern district of New York, in the case of *Schulze-Berge v. The Guildhall*, 58 Fed. 796, there was under consideration a stipulation in favor of a carrier, entered into at Rotterdam, whereby said carrier was exonerated from liability for negligence in the transportation of certain merchandise to New York; and it was held that such a stipulation, valid where made, was contrary to the public policy of this country, and therefore would not be enforced. The question intended to be illustrated by the analogies afforded by the above quotations is whether or not the restriction of the liability of a common carrier in this case, though valid in Illinois, is illegal, or so contrary to the public policy of this state that it should not be enforced on the principle of comity between states. In *Railway Co. v. Davis*, 2 Wilson, Civ. Cas. Ct. App. 156, the statutory inhibition was with reference to restrictive contracts by carriers in that state; hence, that case throws no light on the question involved in this. The language of our constitution, "that the liability of railroad corporations as

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common carriers shall never be limited," is very clear and comprehensive. The legislature of this state, in the face of this provision, is powerless to provide a restriction on the liability which was enforced in *Railroad Co. v. Witty*, *supra*. The courts of this state are equally bound by this constitutional provision, and, by a construction given legislative enactment, or otherwise, cannot limit the liability of a railroad company as a common carrier. The supreme law forbids the exercise of these powers, legislative or judicial; and, as was held in the *Witty Case*, the power by contract in this state to restrict the liability of a common carrier does not exist. The statement that such a restriction is illegal in this state is therefore a mere truism. To ask that the law of this state, on principles of comity, shall give way to the law of Illinois, is to ask that the courts of this state shall sanction what, by the constitution, has been declared illegal, and against the public policy of this commonwealth. To this we can never assent. The instruction, while it embodied an error as to the identity of the law of Illinois with that of this state, nevertheless correctly stated the principles which should govern the jury in its deliberations. For this reason it was not prejudicially erroneous. The judgment of the district court is affirmed. Affirmed.

Instructions—
Harmless Error.

Florida Cent. & P. R. Co. v. Burney.

FLORIDA CENT. & P. R. CO.

v.

BURNEY.

(*Supreme Court of Georgia, Nov. 15, 1895.*)

Mortality Tables—Charge—Error.—The charge of the court as to the methods of using the mortality and annuity tables was incorrect and misleading, and the error thus committed was not, in view of the evidence and the amount of the verdict rendered in the present case, cured by allowing the plaintiff to arbitrarily write off a portion of the recovery. (a) Forms for instructions suggested.

Action for Personal Injuries—Fellow Servants—Negligence.—In an action against a railroad company by an employee for personal injuries alleged to have been occasioned by the negligence of a co-employee, no presumption of negligence arises against the company until the plaintiff has affirmatively shown that he himself was free from fault.

(Syllabus by the Court.)

ERROR from Glynn county superior court. *Reversed.*

The following is the official report :

Burney sued the railroad company for damages from personal injuries, alleging : Prior to September 6, 1893, he was employed by defendant as a flagman.

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On that day, while so employed, while he and one of defendant's conductors were in defendant's cab car at a point where there was a siding, a noise was heard as of cars being shoved together. Thereupon he was sent out by the conductor, under whose control he was, to see what was the cause of the noise, and take care of any car that might have been set in motion. He immediately went out, and discovered that the fireman, without any order from the conductor, who alone had charge of the entire train, had moved back the engine, striking the cars next the engine, and setting them in motion in the direction of the other cars of the train. Under these circumstances, it became necessary for petitioner, in the discharge of his duty, to couple the

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cars together, in order to prevent accident and damage. The cars so set in motion were moving so slowly that there was no difficulty or danger in making the coupling to the other cars, and petitioner at once signaled the fireman to stop the engine, which signal was observed and the engine stopped. Having so stopped the engine, petitioner at once stepped in between the cars to make the coupling (as he was required to do, and could not do without going between the cars), and while he was so between the cars, and in the act of making the coupling, the fireman, without any signal or authority whatever, again set the engine in motion, thereby violently striking the cars and forcing them against the other cars and petitioner, grievously wounding him. Petitioner used every precaution necessary in the performance of his duty, commensurate with the dangers of said employment, and was free from all negligence. Defendant was negligent in moving the engine after having been signaled to stop the same, and after having stopped it, without being first signaled or ordered to move it by petitioner. Further, in permitting the engine to be handled, moved, and operated by the fireman. Further, in permitting the engine to be moved without having on the same the engineer and fireman, who constituted the crew of the engine, to safely handle the same. Neither engineer nor fireman has any authority to move the engine unless so signaled by the conductor or flagman, and to do so in coupling cars is gross negligence. The declaration set forth the nature and extent of plaintiff's injuries, his age, life expectancy, etc. There was a verdict for plaintiff for \$12,108.33. Defendant moved for a new trial, and, its motion being overruled, excepted. After the motion for a new trial was argued, the judge below took the same into consideration. Afterwards, and before the decision upon the motion was rendered, counsel for Burney appeared before the judge at chambers, and moved to be allowed to write off from the verdict and judgment \$3,108.33. Thereupon the judge, over defendant's objection, allowed the motion to write off. To this ruling, also,

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defendant excepted. The motion for a new trial was upon the grounds that the verdict was excessive, and that it was contrary to law, evidence, etc. Also, because the court erred in charging: "In order to ascertain the present value of the diminished prospective earnings of the plaintiff, take the amount ascertained to be his diminished earning capacity at so much per year, and, if you find the same to be permanent, multiply such amount by the number of years of the reasonable expectancy of the plaintiff's life, then take 6 per cent. of the result thus obtained, and then look to the tables of mortality on page 847 of this book. You will take the number opposite the number of years which corresponds with the reasonable expectancy of life of the plaintiff, and you will then multiply such results by these figures; and this would represent the present value to the plaintiff of his diminished earning capacity, and would show the amount the plaintiff would be entitled to recover therefor, if entitled to recover at all, diminished under the rule that the court has given you in relation to the decreasing capacity of plaintiff to make and earn money as he grows older." Alleged to be an erroneous and illegal instruction as to the method of computation. Error in charging immediately after the charge just quoted: "To give you an illustration under this rule which the court has just given you: If, for instance, you should find that the plaintiff was permanently injured, and that his capacity to earn money had been entirely destroyed, and that he had no earning capacity, and that the amount of that earning capacity was \$1.45 per day, you would take that sum as an illustration (\$1.45 per day); multiply that by 30 days, being the number of days in a month, which would give you \$43.50; then multiply the sum by 12, the number of months in a year, which would give you \$522, that being the earning capacity of the plaintiff per year, as thus ascertained. If you should find that his earning capacity had been totally destroyed, that would be his diminished earning capacity per year, to wit, \$522. Taking, as an example, that his age, as

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shown, at the time of the injury was 21 years, looking to this table on page 845, and running down the first column to 21, and taking the figures in the next column just opposite, it is found that the reasonable expectancy of 21 years old is 40 and a fraction. You multiply the sum found for a year, to wit, \$522, in the example or illustration. Multiply that amount by 40, which is the number of years of expectancy of the life of one 21 years old, and that gives as a result \$20,880; then multiply that by 6 per cent., and that gives as a result \$1,252.08. Going then to the table on page 847, and running down the first column to 21, as the age of the plaintiff in this illustration at the time of the injury, and taking the number in the next column just opposite, which is found to be 13 and a fraction, multiply the result obtained last (in multiplying by 6 per cent.) by this number, 13 and a fraction, and you have as a result \$16,286.40, and that, in the example which the court has just given you,—of one whose earning capacity when he is 21 years old is \$1.45 per day, and who is permanently injured and his earning capacity totally destroyed,—that, according to the rule which the court has given you, properly applied, shows the present cash value of the present prospective earning capacity to be \$16,286.40." Alleged to be error, as giving an improper rule, and one not sustained by law or the tables referred to by the court. Under the tables referred to, upon the basis of \$522 per annum and the calculation of 6 per cent. interest, the cash value of the prospective earning capacity, even if plaintiff were entitled to recover, and his earning capacity destroyed, could not exceed \$7,187.41. Error in charging: "A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it to appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company."

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Alleged to be error, in that it instructed the jury that the presumption arose against the company, without regard to the question as to plaintiff first showing that he himself was free from fault, or that the company failed to exercise reasonable care and diligence.

Crovatt & Whitfield and Denmark, Adams & Freeman, for plaintiff in error.

F. H. Harris and Symmes & Bennet, for defendant in error.

LUMPKIN, J. 1. The reporter has been directed to prefix to this opinion a statement of the instructions given by the trial judge with reference to the methods of using the mortality and annuity tables. As will be readily perceived upon reading the same, these instructions were incorrect and misleading, and, in our judgment, the error committed in giving them was not cured by allowing the plaintiff to arbitrarily write off a portion of the recovery. As cases of tort are constantly arising, both where death has been caused, and also where permanent injuries have been inflicted, occasioning a total destruction of, or a material diminution in, the earning capacity of the injured person, and generally, on the trial of such cases, these tables are introduced in evidence, and as there is much confusion with reference to the manner of using them, we have concluded to undertake the formulation of instructions concerning their use, which, in each class of cases, respectively, may be appropriately given in charge. It must not be understood that in so doing we are presuming to dictate to our brethren of the trial courts as to how they shall charge on this subject, or to prescribe forms which they must feel constrained to follow; but, as we have devoted much study and thought to this particular matter, we venture to hope that the "charges" below suggested may be found helpful. The plaintiff in the present action sought to recover damages for an alleged permanent diminution in his earning capacity; and it was not, therefore, a case in which the value of a life

Mortality Tables—
Charge—Error.

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was involved. It will, however, in pursuance of the plan we have adopted, be more convenient to present first suitable instructions concerning the use of the tables in a case where death was caused, and then conclude with instructions appropriate to a case like the one now in hand. These instructions, as a whole, can, by making the needed changes in phraseology, be rendered readily adaptable to a case of tort in which there was no death, but a total destruction of earning capacity. On pages 844, 845, and 846 of 70 Ga., will be found, respectively, the Northampton, the Carlisle, and the Actuaries' mortality tables; and on page 847 is a table "showing the value of annuities on single lives according to the Carlisle table of mortality." In order to avoid complication, we shall frame our "charges" upon the assumption that only the tables on pages 845 and 847 are before the jury, and shall designate the last simply the "Annuity Table." Of course, if the other tables mentioned, or tables which have not been mentioned at all, are properly in evidence, the instructions may be varied accordingly. With reference to the "6 per Cent." and "7 per Cent." columns in the annuity table, we have thought it best that juries should be restricted to the use of the latter only, because 7 per cent. is the legal rate of interest in this state when none is fixed by contract in writing, and calculations of annuities based upon any other rate would be purely arbitrary. Indeed, the table in the book referred to might have had, in addition to those it now contains, a 5 per cent. column and an 8 per cent. column, or any other number of columns based on different rates of interest, in which event there would have been no safe criterion, save that just indicated, as to which of them a jury should select. With the table as it stands, limited to the two columns, there is no good reason for taking the one rather than the other, except that which is stated above. The instructions we have undertaken to frame for the guidance of the jury in that class of cases in which the plaintiff seeks to recover for the homicide of another have, of course, been prepared

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with reference to the rule of law prevailing in this state which allows such plaintiff to recover "the full value of the life of the deceased, as shown by the evidence, without any deduction for necessary or other personal expenses of the deceased, had he lived." Code, § 971; Acts 1887, p. 43. Assuming, then, that an action to recover the value of a life is on trial, and that the Carlisle mortality table and the annuity table are in evidence, it would, we think, be proper to give the following instructions, which (for a purpose hereinafter appearing) we will divide, somewhat arbitrarily, into paragraphs, and designate as "Charge 1":

"(1) In case you should find that the defendant is liable, it will be your duty to determine what amount of damages should be allowed.

"(2) Certain tables are in evidence before you. One of them is the Carlisle mortality table and the other is a table showing the value of annuities. We will call the first the 'Mortality Table,' and the second the 'Annuity Table.' They are not binding upon you, and you are not obliged to use them, or either of them. If you use neither, you need not consider the instructions now about to be given; but as these tables are in evidence, and you have the right to avail yourselves of the assistance to be derived from them, it becomes proper to explain them and inform you in what manner and for what purpose each can be made serviceable. Care, however, must be taken to avoid confusion, and you should be very particular not to use one of them where the other ought to be used. You are also cautioned that you cannot advantageously use both in one and the same calculation. While the proper use of these tables separately ought to lead to the same result, using them conjunctively or indiscriminately in the same calculation, or without understanding the real purposes they are respectively intended to subserve, will surely lead to error.

"(3) You should ascertain from the evidence the annual earning capacity of the deceased,—that is, seek honestly to reach a just conclusion from the facts be-

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fore you as to what amount should be regarded as fairly representing his yearly income from his own labor to the end of his life, if he had not been killed; and, in so doing, give due weight to the various contingencies which will be pointed out before concluding these instructions. It is proper to remark just here that the age of the deceased at the time of the killing, and his probable expectancy of life, may be considered in arriving at his average yearly earnings, if in your opinion, in view of all the evidence, his earning capacity would have varied at different periods of his life between the time he was killed and the time he would have died in the course of nature.

“(4) Another and more direct use which you can make of the figures representing such probable expectancy of life will presently be stated. In fixing upon this expectancy you may consult the mortality table, which will now be explained. This table is designed to show the expectancy of life which may be entertained by average persons of given ages. The only material information you can derive from it is the time which an average person of equal age with the one under consideration in the present case may be expected to live. This table has two sets of columns, marked, respectively, ‘Age’ and ‘Expectation Years.’ If it should be desired to ascertain how long a person of average health and constitution, aged 33 years, would probably live, you would look for the figures ‘33’ in the ‘Age’ column; and opposite these figures, in the ‘Expectation Years’ column, on the right of the ‘Age’ column, you would find the figures ‘32.36,’ which would indicate that such a person probably had 32 and 36-100 years to live. In the nature of things, there can be no certainty whether any particular individual will live for a longer or shorter period than the probable expectancy of an average person of his age, as laid down in this table. In estimating the probable length of a given man’s life, as compared with the average duration of life of one of the same age, his health, occupation, habits, and surroundings, just as they are disclosed by the evidence,

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ought to be considered; and the proper weight should be given to all of these things in fixing the expectancy of the life, diminishing or increasing the figures laid down in the table according to the facts in the particular case under investigation. The age '33 years' has been selected merely for illustration. You, of course, in using the table, would select the age appropriate to the present case.

"(5) Having, from the evidence, fixed, as accurately and as fairly as you possibly can, upon the number of dollars representing the yearly earnings of the deceased, and having ascertained from the mortality table, in connection with all the other evidence, his expectancy (that is, the number of years which he would probably have lived), you could, by multiplying one of these numbers by the other, determine approximately what would have been the gross amount of the earnings of his whole lifetime.

"(6) This gross amount, when ascertained, would, of course, have to be reduced to its present value; that is, to a sum which, paid down all at once, would be the just and legal cash equivalent of such gross amount. The present value would necessarily be less than the gross amount, and the longer the life the greater would be the difference in these respective sums. If you pursue the course above indicated, and arrive at the gross amount in the manner which has just been explained to you, it would then be incumbent upon you to make the necessary calculations for ascertaining its present cash value. But, inasmuch as the proper result can be more readily reached by availing yourselves of the work which has been done in compiling the annuity table, you may prefer to resort to it. In that event, you would not find it necessary to arrive at a gross amount, and then reduce it to present value, for the use of the annuity table enables you to accomplish the same end by a shorter process. The following illustration will aid you in understanding how to use this table:

"(7) Suppose a man 33 years old was killed, and at

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the time of his death was earning \$40 per month, which would make \$480 per year. If it was certain that he would continue to earn this amount every year as long as he lived, his labor would represent a yearly annuity of \$480; and one entitled to recover the value of his life would have the right to receive such an amount as would be the fair cash equivalent of an annuity of \$480, payable in yearly installments, during the period the deceased would have lived but for the homicide.

“(8) To arrive at such amount in the case supposed, the annuity table could be made available in the following manner: First, you would look in the column marked ‘Age’ till you found the figures ‘33.’ Opposite these figures you would find, in a column marked ‘7 per Cent’ (it being on the right of the ‘Age’ column), the figures ‘11.448.’ The meaning is that an annuity of \$1, in favor of an average person 33 years old, and to continue through life, would, on the 7 per cent basis, be worth, cash down, \$11.448.

“(9) Therefore, multiplying \$480 by the figures ‘11.448’ would give the cash value of a like annuity of \$480, *viz.* \$5,495.04.

“(10) This annuity table can be used for any age up to 103, and with reference to any sum of money representing, or standing in the place of, an annuity. The illustration shows you how to use the table, but you must not confuse the figures mentioned in it with the actual figures of the case now on trial. On the contrary, you should be governed as to these matters by the evidence.

“(11) You will observe that the illustration given is based upon the assumption that the deceased would have actually earned \$480 every year during the entire period of his life, if he had not been killed.

“(12) It rarely, if ever, happens that a man labors every day until his death, or receives all the while a fixed and regular income from his labor; nor does his capacity to earn money often remain undiminished to old age. In arriving at the amount to be allowed as damages in any particular case, these things should be

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carefully borne in mind. The illustration given is also based upon the further assumption that the supposed person was one whose expectancy of life was that of an average man. If, in any case, the expectancy of the person under consideration would, under the evidence, have probably been greater or less than that of the average man, the amount of the damages to be allowed should be increased or diminished accordingly. In applying these instructions to the case which you are now trying, you will, of course, be governed by its facts and circumstances as proved. Feebleness of health, actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age, with a corresponding diminution of earning capacity, and other causes, may contribute in greater or less degree to decreasing the gross earnings of a lifetime. In estimating damages, a proper allowance and deduction should be made in favor of the defendant for any diminution in income from labor which would have resulted from any of these sources. The defendant is not responsible for the consequences of the acts of others not its agents, nor for results which would in any event, and without reference to the conduct or negligence of the defendant, have come to pass.

“(13) In arriving at the cash value of the life of the deceased, and fixing the amount of the damages, you should take all these matters into consideration, and give them due weight.

“(14) If the defendant is not liable at all, the instructions which have been given concerning these tables should be disregarded entirely. If liable, and you see proper to use the tables, or either of them, an observance of these instructions will aid you in reaching a proper conclusion as to the amount of damages to be allowed.”

[Note. If the evidence so warrants, an additional instruction, such as is embraced in the words below quoted, may be added to paragraph 12. But this should not be done unless, in view of all the testimony,

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the propriety and fairness of such an instruction is manifest: “* * * You should also take into consideration, and give the proper effect to, any evidence before you, if there be such, tending to show a reasonable prospect of increased earnings on the part of the deceased.”]

When the above-mentioned tables are introduced in evidence upon the trial of an action for personal injuries involving an alleged diminution of the plaintiff's earning capacity, and there is evidence to warrant a finding that there was such a diminution, and that it will be permanent (that is, last during the plaintiff's life), the following instructions as to the methods of using the tables may be given. We will designate the same “Charge 2”:

“(1) If you find that the defendant is liable, it will be your duty to fix the measure of the plaintiff's damages. Among other things, he claims that he has been permanently injured, that his capacity to labor and earn money has been decreased, and that this condition will continue to the end of his life. If this contention has not been proved to your satisfaction, you will have no occasion to consult the tables concerning the use of which you will presently be instructed, and should disregard them entirely. But if you find that the defendant is liable, and should believe from the evidence that the plaintiff was capable of earning by his labor so much per year, and, because of personal injuries wrongfully inflicted upon him by the defendant, his earning capacity has been materially reduced, and if the injuries were of such a permanent and lasting character that this decreased capacity to earn money will continue through life, the following instructions will be pertinent:

“(2) [Same as paragraph 2 of Charge 1.]

“(3) You should ascertain from the evidence the annual loss which has been occasioned to the plaintiff by reason of his injuries. To do this, you will have to take into consideration his earning capacity before he was injured, and the per cent. (or ratio) in which

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that capacity has been diminished. Seek honestly to reach just conclusions from the facts before you as to what amount would have fairly represented the yearly earnings of the plaintiff to the end of his life, had he not been injured, and as to the proportion—whether one-fourth, one-half, or more or less than these fractions—in which such earnings will be reduced because of his injuries. In estimating what would have been the plaintiff's probable earnings through life if his laboring capacity had remained unimpaired, you should give due weight to the various contingencies that will be pointed out to you before concluding these instructions. It is proper to remark just here that the plaintiff's age at the time he was injured, and his then probable expectancy of life, may be considered in arriving at what would have been his average yearly earnings but for the injury, if, in your opinion, in view of all the evidence, his earning capacity would have varied at different periods of his life in case there had been no injury.

“(4) [Same as paragraph 4 of Charge 1.]

“(5) Having from the evidence fixed, as accurately and as fairly as you possibly can, upon the number of dollars representing the yearly loss in earnings occasioned to the plaintiff by his injuries, and having ascertained from the mortality table, in connection with all the other evidence before you, his expectancy (that is, the number of years which, at the time of his injury, he could reasonably have expected to live), you could, by multiplying one of these numbers by the other, determine approximately the gross amount of the loss.

“(6) [Same as paragraph 6 of Charge 1.]

“(7) Suppose a man 33 years old, and capable of earning \$40 per month, or \$480 per year, was so injured that he could earn only \$20 per month, or \$240 per year, and that this decreased capacity to earn money would last during his entire life. If it was certain that, but for the injuries, he would have continued to earn the full amount of \$480 every year as long as he lived, his loss on account of the injuries

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would represent a yearly annuity of \$240 ; and, if entitled to recover for such loss, his damages, as to this matter, should be such an amount as would be the fair cash equivalent of an annuity of \$240, payable in annual installments, until the end of his life.

“(8) [Same as paragraph 8 of Charge 1.]

“(9) Therefore, multiplying \$240 by the figures ‘11.448’ would give the cash value of a like annuity of \$240, *viz.*, \$2,747.52.

“(10) [Same as paragraph 10 of Charge 1.]

“(11) For instance, you will have noticed that the case supposed in the illustration is one where the earning capacity was reduced one-half. It might be that it was reduced two-thirds, or only one-third, or one-fourth, or any other fraction. The true per cent. of the decreased capacity must in each case be ascertained from the evidence, the question being, ‘In what proportion does it show the ability to earn money has been lessened?’ You will also observe that the illustration given rests upon the assumption that the injured person would have actually earned \$480 every year during the entire period of his expectancy, if he had not been hurt, and his consequent loss on account of the decrease in his ability to labor is calculated upon that basis.

“(12) [Same as paragraph 12 of Charge 1.]

“(13) In arriving, therefore, at the amount which should be allowed the plaintiff on account of loss arising from diminished ability to labor, you should take all these matters into consideration, and give them due weight.

“(14) [Same as paragraph 14 of Charge 1.]”

[Note. In a proper case, the reading of paragraph 12 of Charge 1 as a part of Charge 2 may be followed by giving the additional instruction below quoted. In this connection, however, see note at end of Charge 1.

“* * * You should also take into consideration, and give the proper effect to, any evidence before you, if there be such, tending to show that there was a reasonable prospect of increased earnings on the part of the plaintiff in case he had not been injured.”]

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2. The rule announced in the second headnote is well settled in this state. It was recognized in the recent case of *Banking Co. v. Hicks*, 95 Ga. 301. Judgment reversed.

NOTE.

Mortality Tables.—See *Macon v. Moore*, 5 Am. & Eng. R. R. Cas. N. S. 555, and note 361.

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v.

TINDALL.

(*Supreme Court of Kansas, March 6, 1897.*)

Injuries to Employees—Negligence.—In an action by an employee to recover damages from a railroad company for personal injuries alleged to have resulted from a defect in the railroad track, negligence will not be presumed, but must be proved. Testimony that there was a defect in the track, and that an injury occurred, is not enough to warrant a recovery. It is necessary to prove that the company knew of the defect, or that it was of such a nature or had existed for such a length of time that, in the exercise of ordinary care, it should have been discovered by the company. *DOSTER, C. J.*, dissenting as to the application to the facts of the case.

Same—Contributory Negligence.—If such employee voluntarily and needlessly places himself in a highly dangerous position, when there is a reasonably safe one provided for him, and he has time to exercise his judgment, and choose a safer place, and injury occurs to him by reason of his choice, he ordinarily cannot recover for such injury.

Case at Bar.—The testimony examined, and held to be insufficient to sustain the verdict and judgment.

(Syllabus by the Court.)

Error from Douglas county district court. *Reversed.*

A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiff in error.

Waters & Waters, for defendant in error.

JOHNSTON, J. This was an action by Thomas H. Tindall against the Atchison, Topeka & Santa Fe

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Railroad Company to recover for personal injuries alleged to have been suffered by him through the negligence of the railroad company. Tindall was a locomotive fireman engaged in the service of the company in New Mexico, and on the night of November 2, 1889, he was upon a locomotive with Thomas Williams, an engineer. They brought a train into the yards at Raton about midnight, and, no brakeman being present to uncouple the engine from the train or pilot it into the roundhouse, Tindall was directed by the engineer to uncouple the engine, which he did. Instead of getting back into the cab, Tindall then took a position on the front end of the engine, sitting upon the pilot beam, with his feet resting upon the pilot. The first switch to be thrown was between 300 and 400 yards from the starting point, and, upon a signal from him to the engineer, the engine was moved forward at a rate of about 5 miles an hour. There had been a storm, and snow was falling, and there was snow upon the pilot and front end of the engine. Tindall had a lantern upon his arm, and with one hand held onto the pilot brace. While reaching to his hip pocket with the other hand to obtain his gloves, there was a jar of the engine, which caused him to fall from the pilot. One of the wheels of the engine passed over and crushed his arm, so that amputation above the elbow was necessary. He alleges that the injury was caused by the negligent construction and maintenance of the track at the place where the injury occurred, and that the defect in the track was such that with proper diligence and care on the part of the company it could have been discovered and remedied in time to have prevented the injury. The company denied the charge of negligence, and averred that the injury was the result of his own carelessness. At the trial, the jury found that the injury was due to the negligence of the railroad company, and awarded \$5,500 to Tindall as damages.

The sufficiency of the testimony to sustain the ver-

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dict is the first question to which our attention is directed. On the part of the company it is contended that the track was not defective or dangerous, and that, if there was a defect, the company did not know, and could not by the exercise of ordinary care have known, of its existence. What the defect was is not shown, and what caused the jar of the engine is a mystery not solved by the testimony. Williams, the engineer, testified that, "at the time he fell, I felt a jar of the engine, as if we struck a rough place in the track. Of course, I couldn't tell just what it was, but it felt like a low joint." Again, he stated that "I felt a jar of the engine as if there was a rough track. At the time, of course, I couldn't say exactly what kind of a track it was, but the track was rough there at that time; at least, it felt that way." After stating that some jars were usually felt upon the engine, he testified that the one that occurred when Tindall fell off the engine was "above the ordinary." In answer to an inquiry as to how he came to fall from the pilot of the engine, Tindall testified as follows: "It felt like she came against something, and struck pretty hard, and I was thrown off. Q. What was the matter with that track, if you know? A. There was a rough piece of track. Q. You are conversant with the condition of the tracks in the yard limits and on the mainline track? A. Yes, sir. Q. State to the jury how it compares in point of roughness with the ordinary siding and the ordinary switches, if you know. A. Well, we are used to ordinary bumps on the tracks. We don't pay any attention to those. You have always to look for ordinary track. Q. Well, what was this? A. Well, this was over the ordinary rough track." As the jury have found, there was no evidence to show that there was a low joint in the track where the injury occurred. Shortly after the injury, Tindall requested an employee in the yards, named Bennett, to make an examination of the track at the place of the injury, which he did, but he did not find any low joint there,

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nor anything wrong with the rails except that two bolts were gone from one of the joints. The rails were in their proper places, and were spiked down all right, and the jury have found that the absence of the two bolts in the fish plates joining the rails did not render the track dangerous upon which to run an engine at the speed of five miles per hour. It appears that the tracks in the yards are not as smooth and as solid as the main-line track; and that they are not required to be maintained at the same standard of perfection as the main-line track, where greater speed is necessary, is conceded. There were employees in the yards whose duty it was to maintain the tracks in suitable condition, and, although said to be "somewhat rough," no particular defect has been pointed out. Wherein was the company negligent? No one discovered any defect in the track, and no one knew what caused the jar. While to one witness it felt like a low joint, yet, upon examination, none was found; and, at the place where the injury occurred, it is not shown that the track was out of alignment or out of repair. Whether the jar was caused by a defect in the track, or a temporary obstruction, the evidence does not show. If it be granted that there was a defect in the track, when did it become defective? Did it exist five minutes, five hours, or five days prior to the injury? Was it so obvious that the company or those in charge of the track should, in the exercise of ordinary care, have discovered it? There is no proof that the company knew of the existence of a defect, and nothing to show that it had either notice or opportunity to discover it. Indeed there was no proof at all of what the defect was. A finding of negligence cannot rest upon mere conjecture. As the court instructed the jury "negligence can never be presumed, but must be proved." Testimony that there was a defect in the track, and that an injury occurred, does not establish culpable negligence on the part of the company. In *Harter v. Railroad Co.*, 55 Kan. 250, this doctrine was recognized, and MR. JUSTICE ALLEN remarked: "This, however, is not enough to warrant a recovery

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against the defendant. There must be evidence fairly tending to show either that the defendant knew of the existence of the defect, or that, in the exercise of reasonable and ordinary care and diligence, the defect could have been discovered before the accident." This principle was held to be controlling in *Carruthers v. Railway Co.*, 55 Kan. 600, where the chief justice said that "it is necessary to allege and prove, among other things, that the defendant knew of the defect, or that it was of such a nature or had existed for such a length of time that, in the exercise of ordinary care, it should have been discovered by the defendant, in which case notice ought to be presumed; and, where there is no evidence of such notice or its equivalent, a demurrer to the evidence is properly sustained." As it was not shown that the company knew of any defect, or that it should have known of its existence, the proof is insufficient to sustain the charge or finding of negligence.

It is next contended that Tindall voluntarily and unnecessarily took a dangerous position on the front of the engine, when he could and should have chosen a safer place in the cab. The position taken by him appears to have been one of great danger. It was in the nighttime, and it was dark and windy. There had been a snow-storm, and there was snow upon the pilot. The engine was the ordinary one used on the main line, without footboards, handrails, or other provisions for carrying employees on the front, such as may be found on switch engines. A position on the pilot or pilot beam of such an engine is generally regarded to be somewhat dangerous, but the hazard must be greatly increased when the pilot is covered with snow. Tindall had no duty to perform which required him to ride on the front of the engine. The jury find that he voluntarily assumed the position, as the engineer did not direct him to ride there, and no rule of the company required it. The cab was the place provided for riding upon the engine, and, as the jury find, it was a much safer place than the one which he took. It was

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also found by the jury that he could have performed the duties required of him by riding in the cab, instead of on the front of the engine; and the question of whether he should have taken the safer place is one of great importance. If he voluntarily and needlessly took a highly dangerous place when a reasonably safe one was provided for him, he ordinarily cannot recover for resulting injuries. *Railway Co. v. Estes*, 37 Kan. 715. The case of *Railway Co. v. McCally*, 41 Kan. 639, is referred to and relied upon, but the facts of that case differ materially from those of the present case. There it was shown that the switchman would necessarily have to get on the pilot of the engine to make the couplings and perform the duties required of him, while in the present case there was no duty which required Tindall to assume the perilous position which he took. In the *McCally Case* the immediate cause of the injury was the reckless misconduct and gross mismanagement of the engineer in charge of the engine that was used in doing the switching, while in this case the jury have found that the engineer of the engine upon which the plaintiff was riding was not guilty of negligence. The cases differ in other respects, but, however much they may correspond, we think it was the duty of the court, upon request, to submit to the jury the rule of law referred to in the *Estes Case*. The following instruction was requested and refused: "The jury are instructed that if, in the discharge of a duty, an employee of a railroad company voluntarily places himself in a dangerous position unnecessarily, when there is another place that is safer that he could have chosen, and he has time to exercise his judgment, and injury occurs by reason of his choice, he cannot recover for such injury." Other instructions embodying the same view of the law were requested and refused, and, while the jury were told in a general way that the plaintiff could not recover if his own negligence contributed proximately to the injury, no declaration of law like the one requested was given. It is substantially the rule as laid down in the

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Estes Case, and, in view of all the testimony of the case, we think the company was entitled to an instruction like the one requested. The judgment of the district court will be reversed, and the cause remanded for further proceedings. Case at Bar.

ALLEN, J., concurs.

DOSTER, C. J. I concur in the reversal of this case because of the apparent negligence of the defendant in error, and the failure of the court to instruct thereon as requested by the plaintiff in error; but I dissent from the view of the majority of the court that knowledge of the defect causing the injury in question is not imputable, under the evidence, to the plaintiff in error. A railroad company is presumed to have knowledge of a defect in its machinery, or a dangerous condition of its track, existing under such circumstances as to give it reasonable opportunity to learn of the same. What that length of time may be depends upon the circumstances of each particular case. In this case the injury was caused, proximately or otherwise, by some defective condition of the track in the company's switch yards, of such a character and existing for such length of time as to have been known to the company, or ascertainable by it in the exercise of the duties it owed to its employees. The testimony of Mr. Williams, the engineer in charge of the engine from the pilot of which the defendant in error was thrown, is that he felt in his station in the cab a jar, as of running over a rough place, seemingly like a low joint. In immediate concurrence with such jar, the defendant in error fell from his position. No witness pretends to account for such jar upon any other theory than a bad place in the track, and the jury found that the defendant in error was thrown from his position by the running of the engine over a rough place in the track. Had such place been out on the main line, observable only by section men with several miles of road under their charge, and a consequent lack of opportunity and time to discover and repair it, knowledge of the same could not, perhaps, be

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imputable to the company, unless its existence had been known for some time; but the defect in question was in the company's yards at a division point, where scores of its employees, some of them managers of its interests in such respect,—its vice principals, such as superintendents, road masters, track inspectors, and section foremen,—were passing over its grounds all hours of the day, and to some extent during the night. A defect in the track at such place, serious enough to have caused or contributed to the injury in question, could have been known to some of them had they been diligent in the performance of their duties. The only answer that can be made to this proposition is that such defect may have been of such recent origin and short existence as not to have been brought home to the knowledge of the managing employees. I deny it. A rough place in the track caused by a defective tie, a low or springing joint, a warped or worn rail, cannot, in reason, come into such ill condition in a moment, in an hour, nor in a day, but must grow apace into such condition. Some stress was laid in argument upon the fact that railroad companies, in the commendable practice of economy, put their defective rails and ties into their switch tracks, so as to preserve the better ones for service at other points where most required. Such may be admitted, and no fault can be found; but that does not relieve such companies from the obligation to use such rails and ties and maintain their tracks in such repair as will respond to the demands of the service, less onerous, though they be, than the requirements of other parts of the line. The defect in question must, in the nature of things, have existed for such a length of time, and so plainly in the sight of the company's managing agents, as to charge it with knowledge of its existence. Little importance should be attached, I think, to the fact that, upon examination of the place where the accident occurred, evidences only of a slight defect in the track were discovered. This examination was many hours after the occurrence, and after ample time to repair the defect had elapsed. A motive upon

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the part of the responsible parties to obscure the defect existed, and the fact that no defect of consequence was discovered furnishes ground to suspect that it had been repaired. As an abstract proposition of law, the first syllabus of the opinion of the court is correct, but I believe its application to the facts of this case is unwarranted.

ATCHISON, T. & S. F. R. Co.

v.

WILLEY.*

(*Supreme Court of Kansas, March 6, 1897.*)

Personal Injuries—Damages.—Loss of memory or impaired mental constitution are not the natural or probable results of mere bodily injuries negligently inflicted by one person upon another, and before recovery therefor, as items of damage resulting from such injuries, can be had, they must be specially pleaded.

Accident at Crossing—Negligence.—The allowance by a railroad company of a hedge and grove of trees upon its right of way at a country highway crossing, of sufficient height and density to obstruct the view and prevent the hearing of trains by travelers upon such highway, whereby injuries result to them from such trains at such crossing, cannot, in law, be charged as negligence, but must be left to the jury for determination as a fact. DOSTER, C. J., dissenting.

(Syllabus by the Court.)

ERROR from Sumner county district court. *Reversed.*

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error.

C. J. Garver and W. W. Schwinn, for defendant in error.

DOSTER, C. J. The defendant in error (plaintiff below) sued for damages resulting from bodily injuries, caused, as he says, by the defendant's negligent maintenance of obstructions to sight and hearing at a public road crossing, and by its failure to signal the approach of its train to such crossing, as

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*See note at end of case.

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required by law. The evidence showed that he was traveling in a wagon along the public highway, and nearing the defendant's track, and that his view of the direction of the approaching train was obstructed by a grove of trees and a line of hedge, extending from the adjacent lands to the defendant's right of way, and to within about 26 feet of the track. The jury found, in answer to special interrogatories, that the hedge and grove of trees in question constituted such an obstruction as to prevent the plaintiff from seeing the approaching train; and also found that he looked in the proper direction, but was unable to see the track or train because of such obstruction; and also found that he was unable to hear the approaching train because of the noise of the wind in the trees of the grove, and the lack of noise in its movement. The locomotive collided with his wagon and team, throwing him to the ground, breaking the bones of one of his legs, and also one of his arms, and making large and severe flesh wounds on one of his shoulders, and also making, using the language of his petition, "large contused wounds and gashes on his head," from all of which injuries, as he says, "he was for a long time confined to his room, and for two months of such time confined to his bed, and has during all such time, and does still, endure a great deal of pain and suffering on account of said injuries." The petition contains no statement of injurious consequences to his mental faculties or mental health because of any of the hurts received. The place where the accident occurred was on the level, open prairie of Sumner county, distant two miles or more from Belle Plaine, the nearest station. The court below, over the objections of the plaintiff in error, received evidence of impaired memory and weakened mental condition resulting from the injuries received, and instructed the jury, against the defendant's objection and exception, that damages might be allowed for "the injury to his memory and mental faculties, if it be found that he suffered such." The reception of this evidence and the giving of this instruc-

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tion constitute error. A party is entitled to recover for all consequences which are the natural and probable result of injuries negligently inflicted upon him by another—that is, for those consequences which the common experience of men justify us in believing will result from an injury, the extent and character of which is known—without specially alleging them as grounds of recovery. Any result following an injury, but beyond the usual and natural consequences flowing therefrom, must be specially alleged, so as to apprise the opposing party of an intention to claim damages therefor. We may well conclude that in consequence of the severe injuries which plaintiff received he would suffer much physical pain, would be lamed and disfigured in person; but it is not according to the common experience of men that such injuries result in mental infirmities. If, however, they do, the injured person may well claim damages therefor; but, being beyond the range of natural and probable consequences, they must be specially alleged. It is quite questionable also that the instruction of the court authorizing the jury to take into account as elements of damage the diminution of the plaintiff's powers and capabilities of enjoying social life, and the embarrassment and mortification suffered by him on account of the crippled and disfigured condition of his person resulting from his injuries, was erroneous for the same reason, they not being specially alleged.

In respect of the maintenance of the hedge and grove on the defendant's right of way as obstructions to the view of travelers on the public road, the court instructed the jury in three separate paragraphs as follows:

Accident at Crossing—Negligence.

"If you believe from the evidence that the defendant had growing upon the right of way of its railroad a hedge and trees and shrubs, so as to prevent a person coming up to said track for the purpose of crossing it from seeing a train approaching on said track, and was keeping and maintaining said right of way in that condition after having knowledge or reasonable means of

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knowledge of its condition, then you will be justified in finding that the defendant was guilty of negligence in permitting said right of way to remain in that condition. And if you believe from the evidence that the plaintiff, on approaching the crossing of the railroad track, exercised ordinary prudence and care in attempting to cross said track, and was prevented from seeing the approach of defendant's train by reason of said hedge, trees, and undergrowth, and the plaintiff's injury was occasioned by the fact that he failed to see said train on account of said trees, hedge, and undergrowth, then your finding should be for the plaintiff."

"It is the duty of a railroad company operating a line of railroad on which it runs trains of cars by locomotive engines to keep its right of way—that is, a space fifty feet wide on either side of the center of its line of railroad—free and clear from any growth of trees, shrubs, or hedges which will obstruct the view of a traveler on a public highway desiring to cross the railroad track; and if you find from the evidence in this case that there was a growth of trees and undergrowth and a hedge on the right of way of the defendant which obstructed the view of the plaintiff, and which prevented him from seeing the approach of the defendant's train until it was too late to avoid a collision, then your finding should be for the plaintiff, unless you find that the plaintiff was guilty of such negligence or want of care as occasioned the accident."

"If you believe from the evidence that the witnesses, W. H. Willey and Geo. Willey, exercised ordinary care and prudence in attempting to cross the defendant's railroad track, and acted in going up to and attempting to cross said railroad track with such caution and care as an ordinarily prudent man would exercise under like circumstances; and you further find that the servants of the defendant failed to sound the locomotive whistle eighty rods from the crossing, or that the defendant permitted a growth of trees and undergrowth and hedge to stand upon its right of way, so as to obstruct the view of said witnesses, and to prevent them from

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seeing the approaching train, and that their view was prevented by such trees and undergrowth and hedge, and the accident was caused either by the failure of the servants of the defendant to sound the locomotive whistle or by reason of said trees and undergrowth and hedge obstructing the view of said witnesses,—then your finding must be for the plaintiff."

The giving of these instructions likewise constitutes error. In the cases of *Railway Co. v. Williams*, 56 Kan. 333, and *Railway Co. v. Hinds*, 56 Kan. 758, it was held that the question whether the maintenance upon a railroad right of way of obstructions to the sight of passing or crossing travelers is a question of fact for the jury, and not of law for the court. In the case under consideration it will be observed that the court below declared the law without qualification to be that the maintenance by the company of the hedge and grove upon its right of way, if of sufficient height and density to obstruct the view from the highway, was negligence as to the plaintiff, if injured because thereof. This instruction cannot be upheld.

The above are the views of the majority of this court, but not of the writer hereof. The general doctrine that negligence is a question of fact for the jury, and not of law for the court, is conceded; but it is also true that where the facts are admitted or proved beyond dispute, and but one deduction can be drawn from them, it presents a question of law for the courts. *Railway Co. v. Pointer*, 14 Kan. 38, 53. To my mind, this case falls within the doctrine last stated. The allowance upon the right of way of the grove and hedge in question was absolutely unnecessary to any conceivable purpose of the company, and it admitted the fact by cutting the same down soon after the accident in question. Its obstruction to a view of the railroad track and approaching trains was a source of daily danger to passing travelers, to the lives of its passengers and employees, and to the safety of its own property interests. If proved to be of sufficient height and density and closeness to the track to obstruct the view from the

Notes.

highway, every element of disputed fact is removed from the field of controversy. There remains, therefore, but a single question: Is the maintenance of such obstruction, subserving no possible use to the company, negligence in law? In my judgment, it is. The courts of Illinois have so held. *Railroad Co. v. Tilton*, 26 Ill. App. 362-366; *Railroad Co. v. Hillmer*, 72 Ill. 235, 239; *Railroad Co. v. Smith*, 78 Ill. 112; *Dimick v. Railroad Co.*, 80 Ill. 338; *Railroad Co. v. Siltman*, 88 Ill. 529.

It is also very questionable to my mind whether it was not the duty of the plaintiff below, being unable, because of his obstructed view, to see whether a train was approaching, or to hear its approach because of the noise of the wind in the trees to stop before driving so close to the track, and assure himself of safety, and whether his failure to do so should not, as a matter of law, be adjudged contributory negligence; but this view has likewise been precluded by the case of *Railroad Co. v. Hinds*, *supra*, and like preceding ones. Regard for one's own personal safety and that of others to whom he may stand in dangerous relations requires the exercise of diligence and caution, and the policy of the law should be to impose penalties upon the negligent injurer, and likewise withhold relief from the negligent sufferer.

Many other claims of error are urged. None of them, however, impress us as substantial or prejudicial; but because of the two above ruled upon the judgment must be reversed, and a new trial awarded.

JOHNSTON and ALLEN, JJ., concur.

NOTES.

View at Crossing Obstructed by Trees, etc.—It is the duty of a railroad corporation, both under the statute (ch. 140, Laws of 1850) and upon common-law principles, to keep its road at a crossing in safe condition, so that a traveler upon the highway exercising ordinary care can pass over the same in safety. *Gale v. New York C. & H. R. R. Co.*, 76 N. Y. 594; *affirming* 53 How. Pr. 385, 13 Hun. 1.—

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Following Cott v. Lewiston R. Co., 36 N. Y. 214; *People v. New York C. & H. R. R. Co.*, 74 N. Y. 302. *Distinguished in* Egan v. Forty-second St. M. & St. N. A. R. Co., 4 N. Y. Supp. 530.

It is negligence in a company to permit or suffer weeds or anything else to grow upon its right of way to such a height as to materially obstruct the view of a highway crossing; and for an injury that might have been avoided but for such obstruction, the company will be liable. *Indianapolis & St. L. R. Co. v. Smith*, 78 Ill. 112.—*Quoted in* Terre Haute & P. R. Co. v. Barr, 31 Ill. App. 57.—*Chicago & E. I. R. Co. v. Tilton*, 29 Ill. App. 95; *denying rehearing in* 26 Ill. App. 362. *Terre Haute & P. R. Co. v. Barr*, 31 Ill. App. 57.—*Quoting* Indianapolis & St. L. R. Co. v. Smith, 78 Ill. 112.—*Moberly v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 518; *affirmed in* 98 Mo. 183, 11 S. W. Rep. 569.

If it is shown that certain bushes which grew from ten to twenty feet outside of the right of way were at the time of the accident bare of leaves, and in fact no obstruction to the view of the track, it is error for the court to instruct the jury that it is negligence for the company to suffer bush or tall weeds to grow upon its right of way so as to materially obstruct the view of approaching trains. *International & G. N. R. Co. v. Kuehn*, 35 Am. & Eng. R. Cas. 421, 70 Tex. 582, 8 S. W. Rep. 484.

LOUISVILLE N. A. & C. RY. CO.

v.

SCHMIDT.

(*Supreme Court of Indiana, Feb. 23, 1897.*)

Appeal—Error—Pleading.—Where, on appeal, it is clearly disclosed that a special verdict given rests upon the second paragraph of the complaint, the appellant cannot predicate available error upon the action of the court in adjudging, upon demurrer, the first and third paragraphs sufficient.

Accident at Crossing—Frightening Horses—Negligence.*—A person about to drive over a railway crossing near which an engine was standing enquired of the engineer whether she could cross in safety, and being assured by the engineer and the flagman at the crossing that she could do so, started across, when her horse was frightened by the sudden escape of steam from the engine, and ran away, throwing her out and injuring her. It appeared that the engine was under an excessive and unnecessary pressure of steam, which could have been prevented by those in charge of the engine

**Note*—See note 5 Am. & Eng. R. R. Cas. N. S. 282.

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by regulating its fires. *Held*, that the railway company was liable for such injuries.

Bill of Exceptions—Record.—A bill of exceptions is not a part of the record of a case unless it is filed, even though such bill has been signed by the judge.

APPEAL from Hendricks county circuit court. *Affirmed*.

Field & Kinnan and *Brill & Harvey*, for appellant.
Geo. W. Spahr and *Lewis C. Walker*, for appellee.

JORDAN, C. J. This is an action by the appellee to recover damages for the alleged negligence of appellant, which resulted in her sustaining serious personal injuries. There was a special verdict, and upon the facts found the trial court awarded appellee a judgment. On July 5, 1890,—the time of the accident,—appellee, who was about 17 years of age, accompanied by her brother, who was 15 years old, and also by another boy, of the age of 14 years, was riding in a light spring wagon, taking flowers to market, in the city of Indianapolis. At a point on East street, a public street in said city, where appellant's railroad track crosses said street, the horse attached to the wagon became frightened and ran away by reason of appellant's alleged negligence in permitting and suffering the steam in one of its engines standing near the crossing to escape with a loud and unusual noise. This is the second appeal of this cause by appellant. See 134 Ind. 16. It was held in the former appeal that under the issues as then formed the evidence did not support the verdict of the jury, and the judgment was reversed. After the cause was certified back to the lower court, the issues were reformed, and two additional paragraphs to the complaint were filed. It is clearly disclosed that the special verdict rests upon the second paragraph of the complaint, and for this reason alone appellant cannot predicate available error upon the action of the court in adjudging, upon demurrer, the first and third paragraphs sufficient. It is substantially alleged in the second paragraph: That appellant's railroad runs through the

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city of Indianapolis, Ind., and crosses East street, a public street and highway in said city, and that this crossing is much used at all hours of the day and night by persons riding in carriages, wagons, and other vehicles; all of which was well known to appellant at the time of the accident. That on July 5, 1890, the appellant carelessly and negligently ran and moved one of its locomotive engines, with two freight cars attached thereto, and stopped the same near to said crossing and highway, for the purpose of remaining there a long and unreasonable length of time, and carelessly and negligently permitted the same to remain at said point for an unreasonable period of time, where the hissing noises, smoke, and confusion made by escaping steam were liable to frighten horses drawing vehicles along said East street and over said crossing. That at the time said engine was stopped at the said crossing it "had on" an excessive amount of steam that was not necessary for its work, and that the carrying of such a high pressure of steam at such a time and place, under the circumstances, was negligence upon the part of the defendant. That when the defendant so negligently moved said locomotive near to said crossing, and stopped at said point, the steam gauge indicated that the steam in the boiler was liable to escape through the automatic safety valve at any moment, and make a loud, hissing, and unusual noise, unless regulated and controlled, as the defendant at the time knew, and was thereby liable to frighten and cause horses drawing vehicles along said street and over said crossing, thereby causing them to become unmanageable, and run away, as the defendant well knew. That while the said engine, with said cars attached, was standing near to said crossing as aforesaid, the plaintiff, Anna Schmidt, was driving along and upon said street in a spring wagon drawn by a quiet and gentle pony or horse. That with her in said wagon were her brother Joseph Schmidt, and one Eddie Halley. That as she approached said crossing for the purpose of crossing the same, she sent said Halley to the servants in charge of

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said engine, to ascertain if it was safe for her to drive over the crossing and railroad track at that time. That the servants in charge of said engine and the flagman of defendant at said crossing, with the full knowledge of the danger of the steam escaping from said engine as aforesaid charged, informed the plaintiff that it was safe for her to cross, and signaled and invited her to cross, and she, believing from said information and invitation that it was safe to cross, and that no harm would result, started to drive over said crossing, and while driving over the same she was compelled to drive near to said engine, for the reason that it was negligently stationed near to the crossing. That while in the act of driving over the crossing, and when near to said engine, the defendant, without any notice or warning, carelessly and negligently suffered and allowed the steam to escape from the boiler of the engine, thereby making a very loud, blowing, hissing, and unusual noise, which escape the defendant could have avoided by the exercise of reasonable care. It is further averred that the escape of the steam as aforesaid alleged so frightened plaintiff's horse that it became unmanageable and ran away, and upset the wagon in which she was riding, and that she was thrown out and severely injured, etc.

Appellant makes no specific charge of insufficiency against this paragraph, and we are of the opinion that it contains sufficient facts to constitute a cause of actionable negligence. Appellant's counsel in the main contend that the special verdict does not respond to or support the issue as made by the second paragraph of the complaint, that the verdict does not support the judgment, and that the former is not sustained by the evidence. The facts found by the jury bearing upon the question of the alleged negligence in the second paragraph appear to be as follows: The line of the defendant's railroad crosses East street, one of the public streets in the city of Indianapolis, Ind., in the populous part of the city. That said East street, at said crossing, was, on July 5, 1890, much used by the public in

crossing with wagons, carriages, and other vehicles. "That on the morning of the 5th day of July, 1890, the defendant, by its agents and employees, took one of the engines from the building where it kept its engines, designated as a 'roundhouse,' a distance of a few hundred feet from said East street crossing, and backed said engine down to and across said East street to a point about 25 or 30 feet west of the west line of said crossing. That at the time the said engine was brought down from said roundhouse to said crossing said engine came to and passed said crossing, two cars, and a caboose, standing on defendant's switches, west of said crossing, were attached to said locomotive. That after said cars were so attached to said engine, said engine and cars were moved up to within 25 or 30 feet of the west line of said East street crossing, to await orders to go to the yards of the defendant 2 or 3 miles distant, to make up a freight train there to go to Monon, in the northern portion of the state of Indiana." "(4) That at the time that said engine came to said East street crossing from said roundhouse, it carried an unnecessary and excessive amount of steam for the work it was intended said engine to do, and did do, at that time. That 80 pounds of steam would have been amply sufficient for the work which said engine did and was intended to do at that time. (5) Said engine at said time had on it as a part of its appliances a steam gauge, which indicated the amount of steam pressure in the boiler of said engine. That said steam gauge had on it a dial of about six inches in diameter, with figures on the outer rim thereof, and a hand to indicate the amount of steam pressure, and the amount of steam pressure could be easily seen at a distance of seven feet. (6) That said engine also had upon it an automatic safety valve, a device in general use for the purpose of permitting the escape of steam automatically when the pressure of steam reached a given point. That the automatic safety valve of said engine was so adjusted that the steam would escape automatically when the pressure of steam reached 140 pounds, and

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when said steam gauge indicated a pressure of 140 pounds the steam would escape through the automatic safety valve, and make a loud, blowing, and hissing noise. That said device was made and adjusted by the manufacturer of the engine, sealed up, and could not be adjusted or changed by any one in charge of the engine; and whenever the steam was permitted to reach a pressure of 140 pounds, no one controlling the engine could prevent the escape of the steam, or the noise consequent therefrom. That said automatic safety valve and the steam gauge were of the most modern and approved appliances, and were in general use, and were used for the purpose of avoiding the danger incident to a too high steam pressure. (7) That the engineer in charge of said engine looked at the steam gauge at the roundhouse, and saw and knew that it indicated a steam pressure of from 130 to 140 pounds; and that he also saw the steam gauge at the East street crossing, and knew that the steam pressure was increasing, and was not 140 pounds, and that the steam was liable to escape through the safety valve at any moment. (8) That the steam pressure on said engine at said time could have been controlled by the persons in charge thereof, and the increase of such pressure prevented, either by regulating the fire, or by opening the doors of the furnace, or by closing the dampers, and such means may be employed to prevent the increase without injury to the machinery. And, in addition, the same result may be obtained by letting the steam escape into the tank, if the water in the tank is not too hot, and by letting cold water into the boiler, if the boiler is not too full, but the evidence in this case fails to show whether the water was hot in the tank or whether the boiler was full of water. (9). That at no time after the engineer in charge received said engine at the roundhouse up to the time of the injuries to the plaintiff hereinafter mentioned did any one in charge of said engine employ any means to reduce steam pressure on said engine, or to prevent its increase. (10) That on the 5th day of July, 1890, while said engine was

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standing, as aforesaid, about 25 or 30 feet west of the said East street crossing, and while said engine was in the condition as aforesaid, the said plaintiff, Anna Schmidt, in company with her brother, Joseph Schmidt, and another boy, by the name of Edward Halley, were driving north on said East street, in a spring wagon, filled with flowers, for sale in the market, whither they were going. That when they came near the said East street crossing, they saw said engine standing on said track, as aforesaid, and before they attempted to cross stopped their horse and wagon, and said Joseph Schmidt sent the boy Eddie Halley to the persons in charge of said engine, to inquire if it was safe to cross said tracks at that time. That said Halley went to the engineer in charge of said engine, and inquired of him if it was safe to cross the tracks at that time. That said engineer answered 'Yes,' and further said that 'they were not going to pull out for half an hour.' That said engineer knew at that time the steam in the boiler of said engine was liable to escape through the automatic safety valve at any moment, with a loud hissing noise, likely to scare and frighten horses. That said Halley went to the flagman, stationed on the north side of said crossing, and asked him if they could cross. He said 'Yes,' and signaled them with his flag to come across, and that the said Halley also called to them, and waved his hand for them to come across. That said Joseph Schmidt, who was driving, then started to go across, and when he came near to said engine the steam escaped from said automatic safety valve of said engine, with a very loud and unusual noise, which frightened said horse, and caused him to become unmanageable, and to run away, and upset said wagon, and throw said plaintiff into the gutter near the flagman's shanty, and breaking her leg, and otherwise injuring her internally. That said horse was a quiet and gentle horse, and used to the cars; and that the driver, Joseph Schmidt, was accustomed to the use of and driving horses. That at said time he was fifteen years

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of age, and did all he could to check and control said horse. (11) That the evidence does not show the precise length of time said engine was standing near said crossing, but it does appear from the evidence that it was several minutes, and the engineer and fireman were at and on said engine, oiling and cleaning it. That a portion of the time the fireman was on the north side of said engine, and the engineer was on the south side thereof. That the foreman of the crew running said engine was reading orders while at said crossing, but it was not shown whether or not the order was to move, or when to move, or whether the movement of said engine was in pursuance of said order or not. The track on which said engine was standing was the third or fourth on the north side of said crossing."

Briefly stated, the special verdict, among other things, discloses that on the day of the accident the appellant, by its servants, took the freight engine in question from the roundhouse, a short distance from the East street crossing, and backed it to a point near to said crossing, and there stopped the engine and the cars attached to it to wait orders to go to the yards of appellant, some two or three miles distant; that at the time the engine reached the crossing, and while it remained there, it carried an unnecessary and excessive amount of steam for the work that it was to perform; that East street is in a populous part of the city of Indianapolis, and both the street and crossing are much used by persons passing in vehicles drawn by horses; that the engine remained there for several minutes, the precise time being shown by the evidence, and while standing near the crossing the engineer and fireman thereon were engaged in oiling and cleaning the engine, and while so standing the engineer saw and knew that the steam pressure was increasing, and had already reached 140 pounds, the point of explosion, and that it was liable at any moment to escape through the valve. With knowledge of these facts, it appears that no precaution whatever was taken

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by appellant to stop the increase of the steam pressure, and thereby prevent it from escaping as it did, although, as disclosed by the verdict, some simple methods or means might have been employed to avoid that result. Under these circumstances appellant invited appellee to cross, and gave assurance to her that it was safe for her to go over the crossing; and while in the act of so doing the steam was suffered or permitted to escape or blow off with a very loud and unusual noise, which frightened her horse and resulted in the injury of which she complains. The special verdict, in our opinion, substantially responds to the second paragraph of the complaint, and the facts embraced therein, under the circumstances, impute actionable negligence to appellant. The rights and duties of these parties at this public crossing were mutual or equal, and both were respectively bound to do what the law required. *Railway Co. v. Walker*, 113 Ind. 196. She, under the circumstances, had the right to pass over the tracks of appellant, but in doing so, however, she was bound to exercise ordinary care and diligence to avoid injury. There is nothing to indicate that she was not in the exercise of such care upon her part. While, upon the other side, it may be said that the appellant had the legal right, in the line of its business, to move its engine to the point near the crossing where it did, and there stop, however, in permitting the engine to stand there as it did, it was bound to exercise this right with due regard to the safety of others using this crossing. Or, in other words, the appellant, under the circumstances, was required to exercise such ordinary care and diligence as to avoid injury to those travelling upon this street, and over the crossing in controversy. The law interprets ordinary care to be of that degree which a person of ordinary prudence, under the particular circumstances, is presumed to exercise to avoid injury. Such care is required to be in proportion to the danger to be avoided, and the fatal consequences that may result from the neglect. *Railroad Co. v. Goddard*, 25 Ind. 185. In *Billman v. Railroad Co.*, 76 Ind. 174, it is

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said : " The liability of horses to take fright at unusual noises or objects is a thing to be apprehended and guarded against." It is a settled rule that the ordinary use of a locomotive engine by a railroad company, or the ordinary sounding of the whistle attached thereto on proper occasions, or the escape of its steam in like manner, is not negligence. But these rights must be exercised in a lawful manner. The negligent or careless sounding of the whistle or the blowing off of steam at a public street or highway, or at a public crossing, in such a manner as to make an unusual noise, and thereby cause horses driven along or over such street, highway, or crossing to take fright, which results in an injury, is an actionable wrong. *Railroad Co. v. Boettcher*, 131 Ind. 82; *Railway Co. v. Gaines*, 104 Ind. 526. The rule which applies to affirmative acts of negligence in such cases is also applicable to negligence through the omission of a legal duty, whereby the steam is permitted to escape or blow off in like manner to the injury of others. It is a well-recognized legal proposition that actionable negligence may consist in either omitting to do, under the particular exigencies or circumstances, what a reasonable and prudent person would ordinarily have done, or in doing that which he would not have done. The fault of the wrongdoer may lie in, or arise out of, his act of omission as well as that of commission in regard to a legal duty. 16 Am. & Eng. Enc. Law, pp. 404, 405; Whart. Neg. §§ 1-3, 83. Tested by these rules, it is clear, we think, that under the particular circumstances and facts the appellant must be adjudged guilty of negligence in like manner as though the steam upon the occasion in controversy had been blown off through the active agency of its servants in charge of the engine. When all of the facts in the case are considered, appellant's liability can not be successfully controverted. It placed the engine at the crossing (over which persons at all times were passing with horses) under an excessive and unnecessary pressure of steam, and permitted it to stand there for a period of time,—long enough, at least, to warrant

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its employees in charge to engage in oiling and cleaning the machinery,—without exercising any care or employing any of the means or methods which the jury find it could have employed to control or reduce the steam, and thereby prevent it from escaping in the manner it did. While it is true the valve appears not to have been under the control of the engineer, and was liable to let the steam escape automatically when it had reached a certain pressure, still the fire which produced the steam was under the control of appellant's servants, and the jury find that the increase of the steam could have been prevented by regulating the fire, or by opening the doors of the furnace, or by closing the dampers. These means were practicable, and could be employed without any injury to the machinery, as the finding discloses. None of these were used, but the steam pressure was permitted to increase until it had reached a point where it was liable to blow off at any moment; and with this fact evident to the engineer, affirmative assurance of safety was given to appellee, and she was invited to cross, and thereby subjected to a peril of which she had no knowledge, but which was well known to appellant. Having been thus invited, she had the right to presume that necessary precaution had been taken by appellant to render the act of her crossing safe, at least so far as any of its acts were concerned. Under the circumstances she had no reason to apprehend that the steam in the engine was not under control, and, while passing, would escape as it did, and alarm her horse. The authorities affirm that when a person rides or drives up to a railroad crossing by the invitation or direction of a flagman or gate keeper there stationed, and is injured at such crossing from trains, machinery, or appliances of the railroad company, he has the right to recover, because the invitation or direction was an assurance of safety upon which he had a right to rely. 4 Am. & Eng. Enc. Law, p. 931; Railway Co. v. Keely, 138 Ind. 600; Elliott, R. R. § 1157; Railroad Co. v. Horst, 110 Pa. St. 226; Keech v. Railroad Co. (Sup.) 13 N. Y. Supp.

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149. In the case last cited the plaintiff approached a railroad crossing, where the defendant's engine and cars had stopped. The plaintiff inquired if it was all right for him to go on. A servant on the engine replied: "It is all right; go ahead." Plaintiff did so, and when abreast of the engine, and within 40 feet of it, the steam began to escape from its "pop whistle," and alarmed his horse, causing it to throw him from the buggy, and breaking his leg. It appeared that the "pop whistle" was not under the control of the engineer. The court held that, although there was no evidence of negligence in the operation of the engine, the assurance of safety, made to the plaintiff without reservation, implied the control of the engineer over the engine and its instruments of alarming sounds, and that the defendant was liable for plaintiff's injuries received in acting upon the assurance. The court there said: "If the pop whistle was not under control, but worked automatically, and was liable to go off whenever the engine stood still, these facts were known to the engineer. The plaintiff was not shown to have known them. The question would then be whether it was negligent to stop the engine in advance of the plaintiff instead of in the rear, and tell him to go ahead, without regard to the liability of the pop whistle to go off. The assurance of safety was made without reservation, and implied, we think, the control of the engineer over his engine and its instruments of alarming noises." This reasoning is peculiarly applicable to the facts in this appeal. The engineer knew that the steam valve was not under his control; that it acted automatically when the pressure attained 140 pounds, and permitted the steam to escape at that point with a loud and unusual noise. He knew that the pressure had already reached this point, and was upon the very eve of exploding through the valve, when, in response to the inquiry if it was safe to cross at that time, he answered that it was, and in this the flagman seems to have concurred, and signaled the parties to cross. This, under the circumstances, reasonably implied and

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carried with it the assurance that the engineer had control over his engine and its appliances, and that there would be no such alarming escape of steam as happened upon the occasion. In view of the facts, we are of the opinion the court did not err in awarding judgment in favor of appellee upon the special verdict.

Appellant insists that upon the evidence, when tested by the decision in the former appeal, there can be no recovery. Counsel for appellee, however, contend that the evidence is not in the record, and we are of the opinion that their contention must be sustained. The record recites that

Bill of Exceptions—Record.

“the defendant, on March 3, 1894, filed in the office of the clerk the long hand manuscript of the evidence adduced at the trial, which longhand manuscript is recited to be as follows.” (Here follows what appears to be a longhand report of the evidence.) The trial judge certifies that this longhand manuscript was presented to him as a bill of exceptions on April 4, 1894, and was signed by him on June 11, 1894. If this could be regarded as a proper bill embracing the evidence, it would be clear that it had been filed before receiving the judge's signature. Nowhere does the record disclose that what was intended as a bill of exceptions was filed after it received the signature of the judge, on June 11, 1894. After a bill has been signed by the judge it must be filed in order to become a part of the record. *Makepeace v. Bronnenberg* (at this term) 45 N. E. 336. It follows, for the reason stated, that the evidence is not in the record, and we cannot consider any question arising out of or depending thereon. Judgment affirmed.

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SHADFORD

v.

ANN ARBOR ST. RY. CO.

(Supreme Court of Michigan, Jan. 5, 1897.)

Duty of Master to Furnish Proper Appliances—Negligence.*—Appliances that are ordinarily and generally used are all that a master is required to furnish, and his failure to furnish the safest appliances known does not render him guilty of negligence.

Same—General Use—Error.—In the absence of evidence that an appliance furnished by an employer is not such as is generally used in the same or similar work, it is error to submit to the jury the question whether the appliance is such as is generally used in the same or similar work.

ERROR to Washtenaw county circuit court. *Reversed.*

Isaac N. Payne (*Robert Young*, of counsel), for appellant.

A. J. Sawyer, for appellee.

LONG, C. J. On September 29, 1894, plaintiff, then about 23 years of age, was employed by the defendant company in the capacity of a lineman, and was engaged with one Wilson in constructing a curve in the trolley wire of defendant's street-railway equipment at the junction of Wells street and Forest avenue, in the city of Ann Arbor. In the performance of his work, plaintiff stood on a platform of the dimensions of 8 by 4 feet, erected upon a common lumber wagon. This platform was about 14 feet above the ground, the workmen being protected by a railing, 2 feet high, erected on three sides of the platform.

*See 5 Rap. & Mack's Digest 72; notes 15 Am. & Eng. R. Cas. 238; 5 Id. 504, 513; 28 Id. 546; *Gardner v. Michigan, etc., R. Co.*, 59 Id. 244; Id. 158, 151, 173, 189; 48 Id. 215.

To the same effect as the principal case see *Johnson v. Boston, etc., R. Co.*, 2 Am. & Eng. Corp. Cas. N. S. 631; *Homestoke Min. Co. v. Fullerton*, Id. 596; *Friel v. Citizens R. Co.*, 59 Am. & Eng. R. Cas. 151.

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Plaintiff was endeavoring to fasten a guy wire to the trolley wire in order to produce the curve necessary. To do this he used a hand vise, to which was fastened a strap. The vise was screwed to the guy wire, the strap thrown over the trolley wire, and the trolley wire drawn into position. The plaintiff then attempted to fasten the slack of the guy wire into the goose necks attached to the trolley wire. To do this he passed under the trolley wire, and into the inside of the curve made by that wire. He put one arm over the trolley wire. At this instant the vise failed to hold the guy wire, the trolley wire was violently released, and the plaintiff was hurled to the ground, sustaining injuries which nearly paralyzed both limbs, and from which he has never recovered. The trial in the lower court resulted in a verdict and judgment for plaintiff. Defendant brings error.

On the trial the plaintiff contended that the railing around the platform was too low to properly protect the workmen; that the hand vise used was an improper and unsafe tool for the work required; that it was also defective; that plaintiff was not properly instructed in its use; that a device known as a "come along" should have been used; that plaintiff was not guilty of contributing to his own injury. The court submitted those questions to the jury. But defendant contends: (a) That the evidence is conclusive that the defendant supplied tools that were safe; (b) that it was not bound to furnish the plaintiff with tools of the latest device or pattern, but if the tool furnished was such as was in common and general use by other companies doing like work, the defendant had discharged its duty to the plaintiff; (c) that the evidence is conclusive that the vise was in common use by other companies.

But one question need be considered, as the evidence is conclusive that the vise was in no way defective, and that is whether the tool furnished was such as was in general use by other companies doing like business. Neither individuals nor corporations are bound, as employers, to in-

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which they provide for the use of their employees ; nor are they bound to supply the best or newest of those appliances for the purpose of securing the safety of those who are thus employed. *Railroad Co. v. McDade*, 135 U. S. 554. In *Sisco v. Railroad Co.*, 145 N. Y. 296, the court says : " The employer does not undertake with the employee that he will use the very best appliances, nor is he called upon to discard machinery adopted by him in his business reasonably suited therefor, although there may be other machinery that may be safer. He is bound to the exercise of reasonable care in providing machinery and appliances, in view of all the circumstances. Still less is the master to be cast in damages for error of judgment in selecting one method of prosecuting his business, or one kind of machinery or appliances, on proof that another method or appliance is better or safer, when both methods or kinds of appliances are in common use. * * * Proof that it was dangerous is not enough,"—citing *Frace v. Railroad Co.*, 143 N. Y. 182 ; *Flinn v. Railroad Co.*, 142 N. Y. 11. See, also, *Titus v. Railroad Co.*, 136 Pa. St. 618 ; *Kehler v. Schwenk*, 144 Pa. St. 348 ; *Railroad Co. v. Allen's Adm'r*, 28 Am. & Eng. R. Cas. 514. In the latter case, it was said : " We conceive the correct and just rule to be that a railroad company's duty to its employees does not require it to adopt every new invention or appliance useful in its business, although it may serve to diminish risk to life, limb, or property incident to its service. It is sufficient fulfillment of its duty to adopt such as are ordinarily in use by prudently conducted railroads engaged in like business and surrounded by like circumstances." In *Titus v. Railroad Co.*, *supra*, and reported in 20 Am. St. Rep. 944, 946, and note, it was said : " Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence ; and the unbending test of negligence in method machinery, and appliances is the ordinary usage of the business. No man is held to a higher degree of skill than the fair average of his trade or profession,

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and the standard of due care is the conduct of the average prudent man. The test of negligence as to employers is the same ; and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall in effect dictate the custom or control the business of the community." This rule is laid down in *Hosic v. Railroad Co.*, 75 Iowa 683 ; *Vinton v. Schwab*, 32 Vt. 614 ; *Railroad Co. v. Coleman*, 28 Mich. 449 ; *Hagan v. Railroad Co.*, 86 Mich. 615.

There is no evidence in the present case that the vise was out of repair, and it is shown without contradiction that other street railways, as well as telephone and telegraph companies, used the same device. The court submitted to the jury the question as to whether other companies used this device as follows: "If the jury find that the vise complained of as causing the accident was of a kind in general use throughout the country, in the same or similar lines of work, and was not itself broken or defective, the defendant cannot be found guilty of negligence in the selection or use of the vise." We find no evidence in the case that the vise was not so used, and the court should not have submitted that question to the jury. The rule is well settled in this state that an employer cannot properly be held to be under so strict obligation to his servants as to be required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and to supply its place with something better and safer. *Railroad Co. v. Gildersleeve*, 33 Mich. 133. See, also, *Railroad Co. v. Bayfield*, 37 Mich. 205 ; *Richards v. Rough*, 53 Mich. 212 ; *Sjorgren v. Hall*, 53 Mich. 274 ; *McGinnis v. Bridge Co.*, 49 Mich. 469 ; *Smith v. Pot-*

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ter, 46 Mich. 259; Piquegno v. Railway Co., 52 Mich. 44. We are of the opinion that the court below should have directed the verdict in favor of the defendant, as requested by counsel. The judgment below will be reversed, and a new trial granted.

HOOKEER, J., did not sit. The other justices concurred.

NEW YORK, C. & ST. L. R. Co.

v.

OSTMAN.

(*Supreme Court of Indiana, Dec. 22, 1896.*)

Injury to Employee—Negligence.*—When there is an action against a railway company for the death of an employee, arising out of its alleged negligence in erecting or maintaining a chute in too close proximity to its tracks, the test of such negligence is whether such chute is dangerous or unsafe to persons operating its trains when they are exercising, under the particular circumstances, ordinary care.

Same—Contributory Negligence.—A fireman, twenty-five years old, in the employ of a railway company, was killed, while leaning from the window of his cab and looking back for signals, by striking his head against a chute near the track. It appeared that he had frequently passed the chute, which was conspicuous, and had ample opportunities to learn of its close proximity to the track, and that he was familiar with the printed rules of the company enjoining upon the employees to familiarize themselves with the tracks and dangerous points of the road, and to take time and exercise care to do their duty in safety, whether acting under the orders of a superior or not. *Held*, that there could be no recovery for his death.

APPEAL from Allen county circuit court. *Reversed.*

Morris, Bell, Barrett & Morris, for appellant.

Ninde & Ninde, for appellee.

* *Obstructions near track.*—See 5 Rap. & Mack's Digest, p. 62; notes 22 Am. & Eng. R. Cas. 545; 23 Id. 397; 48 Id. 168, 181; 5 Am. & Eng. R. Cas. N. S. 547; 53 Id. 447; 59 Id. 268. See *Pierce v. Camden, &c., R. Co.*, 5 Am. & Eng. R. Cas. 548; *Crandell v. New York, &c., R. Co.*, Id. 543 and note.

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JORDAN, C. J. Appellee commenced this action in the lower court to recover damages of appellant arising out of the death of her decedent, Charles Ostman, by reason of the alleged negligence of the railroad company. The deceased was the husband of appellee, and the fatal accident which resulted in his death occurred on April 8, 1891, at Burr Oak, a station on appellant's line of railway. There was a special verdict returned by the jury, upon which the court rendered its judgment in favor of the appellee for \$4,000, the amount assessed by the jury. Among the errors assigned by the appellant is one based upon the action of the court in awarding a judgment to appellee, under the facts set out in the special verdict. From the special verdict the following facts appear: "The defendant owned and operated a railroad running from the city of Buffalo, in the state of New York, through the city of Ft. Wayne and the town of Burr Oak, in the state of Indiana, to the city of Chicago, in the state of Illinois. That the deceased for 18 months prior to his death was in the employ of the defendant as a locomotive fireman, and for 16 months prior to his death said deceased was employed by said defendant as fireman on its engine 169, and continued to be so employed till his death, as hereinafter set forth. That during said period said deceased, in the discharge of his duties, passed said station at Burr Oak twice each and every week, and frequently did switching and work at said station. That during all of said period the defendant had a side track and spur switch at said town of Burr Oak, both of which were located north of the main track of said railroad. That said side track was about 800 feet long, the east switch of which was about 400 feet east of the cattle chute hereinafter described, and the west switch of which side track was west of the depot hereinafter described. That at said point, 450 feet west of said east switch, the defendant had maintained, near to and on the north side of said side track, cattle pens, from which there was a cattle chute, about 18 feet long, leading from said pens, so

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near to the track that, by the aid of fences, gates, and doors, the stock was driven from said pens into the defendant's cars to be transported. That said chute was constructed as follows: Three oak posts, 6 inches square, were planted in the ground about equally distant from the north rail of said side track. Said posts were 11 feet 6 inches high. One of said posts was located on the west side of said cattle chute, and one about the middle, and one on the east side thereof. That a fence was constructed from each of said posts north to said cattle pens. That said fence, from the said middle post, north, to the cattle pens, divided said chute into two parts. That by means of said middle fence the said chute, between it and said west fence, was 6 feet 2 inches wide; and the chute between said middle fence and the east fence was the same width. That said fence was constructed of pine boards 6 inches wide and 6 inches apart. That a gate was constructed out of pine boards, so that the boards of said gate were so adjusted to said fence that each board of the gate was located in each space between the boards of the fence; and said gate was about 18 feet long and 3 feet 6 inches wide, and was operated by being pushed towards and from the car to be loaded. At the north end of the gate was a board or batten, nailed across the ends of the gate boards to hold them in place; and on the west side of the south end of the gate was a similar board, nailed across the ends of the boards of the gate; and on the east side of the gate and fence were boards, nailed so as to allow the gate to move north and south along the spaces between the boards of the fence. The said boards so nailed across the south ends of the gate boards were placed on the west side of the gate, so that, when the gate was shoved northward, the north edge of said board would strike the face of said post, and prevent said gate from slipping back till the south end thereof was back flush with the south face of the post; but, because of said board striking said post, the south end of the gate, at the time the deceased was killed, was 6 inches further south than the post and 6 inches

nearer the track than said post. That the south face of said post was, at the time said deceased was killed, 38 inches north of the center of the top of the north rail of said side track, and the south end of said gate, at the time said deceased was killed, was 35 inches north of the said center of said rail. That the cab of said engine is 8 feet 6 inches wide. That the distance between the north side of said cab, at the window thereof where deceased was so looking out, and the part of said cattle chute his head came in collision with, was 13 inches. That said distance between said cab and said cattle chute made the said cattle chute so placed extrahazardous for the deceased and other trainmen of said defendant. That the deceased did not know, nor have any reason or opportunity to know, that any part of said chute was within said distance of 13 inches of said cab as it passed the same, but that the defendant and its proper agents and servants did know that said chute was said distance from the cab window as it passed said chute. That said chute had for a long time, to wit, for several years before the deceased was killed, come in collision with parts of the defendant's trains as they passed the same, and frequently knocked off markers from cars and collided with brake wheels attached thereto. That said defendant had notice of said facts, and that said chute was the distance aforesaid from said cab and track as they passed the same, long enough before the deceased was killed to have removed the same to a safe distance from the trains passing the same, and yet during all said time, before and up to the time said deceased was killed, the defendant negligently failed to remove the same, but negligently maintained the same at said dangerous distance from said track and cabs as they passed the same. That the said cattle pens and chute could be seen for a distance of one-half mile and more along the track each side thereof. That when deceased was killed he was firing on said engine 169, which was then and there pulling a local freight train eastward over said railroad. That it became and was necessary to take a car then stand-

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ing on said spur switch into said train, which was coupled onto said engine at the west end of said side track, and was being pulled out over said side track eastward, and past said cattle chute, at the time said deceased was killed, at the rate of about 10 miles per hour. That while said train was so moving eastward over said side track, it became and was then and there the duty of said deceased to lean out of said cab window on the north side of said cab, and look backward for signals, and to see if everything was all right. And the said deceased was so then and there. at the time he was killed, carefully, and in the proper discharge of his duty, looking out of said window, and looking back for said signals, and to see if everything was all right at the time his head and part of his shoulders were partly inside said window and partly outside thereof, so that, as he passed said chute, his head came in collision with said cattle chute, whereby his skull was mashed in and broken, and said deceased was killed. That he died within a few minutes after he so struck said cattle chute. And we, the jury, further find that the board so nailed on the west side of the south end of said gate was longer up and down by the space of two inches than the said gate was wide, and that the upper end of said board was two inches higher than the upper edge of said upper board of said gate, and that said board was so placed upon the south end of said gate that the south edge thereof was from a half inch to one and one-half inches further south than the south end of said boards of said gate. That the top end of said board was further south than the lower end thereof by the space of one inch. That, when said deceased was looking out for signals, and to see if everything was right as aforesaid, and as he passed said cattle chute, the back of his head struck the outer edge of said board so nailed across the south end of said gate as aforesaid, by which collision he was killed as aforesaid. That at the time said Ostman was employed as fireman on the defendant's road, to wit, 18 months prior to April 8, 1891, said defendant railroad

company delivered to said Ostman, and said Ostman received and familiarized himself with its books and rules and instructions, and at the time of his injuries on April 8, 1891, he knew and was familiar with the same. That there was in force on defendant's road, as shown by said book of rules and instructions, at the time of the employment of said Ostman, and continuously to a time subsequent to April 8, 1891, the following rules: '(1) All persons entering into or remaining in the service of this company are warned that, in accepting or obtaining employment, they must assume the risk attending it. Each employee is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, to the public, and to property, especially in switching cars and in all movements of trains. (2) Employees of every grade are warned to see for themselves, before using them, that the machinery or tools which they are expected to use are in the proper condition for the services required, and, if not, to put them in proper condition, or see that they are so put, before using them; also, train and engine men must familiarize themselves with the tracks and dangerous points upon the lines. The company does not wish or expect its employees to incur any risk whatever from which, by the exercise of their own judgment, and by personal care, they could protect themselves, but enjoins upon them to take time in all cases to do their duty in safety, whether they may at the time be acting under orders of a superior or otherwise.' '(4) They must assist in keeping a constant lookout upon the track, and must instantly give the engineman notice of any obstruction or signal they may perceive.' And we further find that said deceased did not know that said cattle chute was so close to said track, or to his cab as it passed the same, as to be dangerous to him, or that it would come into collision with him as he passed the same, and while he was discharging his duties as such fireman. And we, the jury, further find that said deceased was

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so injured and killed without any fault whatever on his part." It is further found that the deceased was 25 years of age at the time of his death.

Appellant affirms that, under the special findings of the jury, the appellee was not entitled to a judgment; and this may be considered the principal question for our determination. The particular insistence is that the facts as found by the jury do not establish actionable negligence against appellant, nor do they show absence of contributory negligence upon the part of the deceased servant at the time of the fatal accident. It is well settled by numerous decisions of this court that in actions of this character, whenever the plaintiff sues to recover upon the ground of negligence, it must be shown that the master was guilty of the negligence charged, and that the servant was free from the contributory negligence on his part, at the particular time of the alleged injury or death. Neither of these essential factors can to any extent be presumed. The special verdict in the case at bar is open to the objection that in some respects it contains conclusions, rather than the finding of facts essential to the issues involved. The theory of the verdict is that the negligence to be imputed to the appellant, under the facts embraced therein, is that of erecting and maintaining the cattle chute in too close proximity to its side track. There is nothing disclosed in the findings of the jury going to show that the chute in question was not built and maintained in the usual and proper place for such buildings. It is a matter of general knowledge that such chutes are necessary contrivances in the operation of railroads, and that they must necessarily be constructed close enough to the track where used as will enable the company to load and unload cattle without injury to the latter. It would seem that the correct standard by which the negligence of the railroad company ought to be measured, when the action is for an injury or death to one of its trainmen arising out of its alleged negligence in erecting or maintaining a chute in too close proximity to its tracks, is that it must be,

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when so erected or maintained, dangerous or unsafe to persons operating its trains when they are exercising, under the particular circumstances, ordinary care. In the case of *Gould v. Railroad Co.*, 66 Iowa, 590, 24 N. W. 227, an engineer was killed by being struck upon the head by a "water crane," close to the track, while in the act of leaning out of the "gangway" of his engine, looking back for expected signals. The trial court charged the jury that if they found, from the evidence, that the water column was placed in such close proximity to the track as to be dangerous to persons operating the trains, they would be justified in finding that the defendant was guilty of negligence in the erection and location of the column. The court held that the giving of this instruction was error, and said: "It is not true that a railroad company is to be regarded as negligent in erecting and maintaining contrivances or things for use in the operation of their roads for the reason that they are dangerous to the persons operating the trains. Indeed, the whole business of operating trains is dangerous. It is full of perils to those employed therein. Because there is danger, it does not follow that the companies are negligent as to the thing from which the danger springs. The instruction should have expressed the thought that, if the crane was dangerous to persons operating trains in the exercise of ordinary care, the defendant was negligent in constructing it." The jury found that the part of the chute that struck the head of the plaintiff's intestate, while he was looking out and back was "thirteen inches from the side of the cab at the window from where he was looking out; * * * that said distance made it extrahazardous for the deceased and other trainmen; that the deceased did not know, or have any reason or opportunity to know, that any part of said chute was within thirteen inches of said cab as it passed the same." The finding that this distance between the particular point of the chute that struck the head of the deceased and the side of the cab, when it was passing the chute, rendered the same extrahaz-

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ardous, is more in the nature of a conclusion than the finding of a material fact, and for this reason must be disregarded in determining the sufficiency of the special findings.

While we have asserted the general rule applicable to the test or question of the negligence of the company, when it is involved as it is in the case under consideration, we may, however, pass without deciding whether the appellant was guilty of actionable negligence under the findings of the jury, as it does not appear from the facts embraced in the verdict that the deceased was himself free from contributory negligence at the time of the fatal accident. It is shown that, before the time of the occurrence, Ostman had been for 16 months and over continually in the employment of the appellant, as its fireman, upon the same engine upon which he was at work when killed; that the chute in question was so conspicuous that it and its location could be seen for a distance of a half mile and more "along the track each side thereof"; that, during this period of time, the deceased, in the discharge of his duties, passed the station where the chute was located, twice each week, and frequently did work and switching at this station. He was 25 years of age,—of sufficient age and capacity, by the use of his senses, to see, appreciate, and comprehend obvious dangers, and thereby avoid them. The finding that the deceased did not have an opportunity to know that the chute was in such close proximity to the side track, in consideration of the other facts, must be viewed more as a conclusion upon the part of the jury than finding of a material fact. He was, as it appears, familiar with and understood the rules of the company, and one of these rules expressly provided: "Also, trainmen and engine-men must familiarize themselves with the tracks and dangerous points upon the lines. The company does not wish or expect its employees to incur any risk whatever from which, by the exercise of their own judgment, or by personal care, they could protect themselves, *but enjoins upon them to take time in all cases*

Same—Contributory
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to do their duty in safety, whether they may be at the time acting under the orders of a superior or otherwise." (The italics are our own.) Under this rule deceased was required to familiarize himself with the tracks and dangerous points upon the lines, and it was not incumbent upon him to incur any risk from which, by the exercise of judgment and care, he could protect himself. This chute was not located upon the main track, but on the switch or side track at Burr Oak. As the deceased frequently did switching at this station, he consequently must have frequently passed this chute on the side track while switching, and thereby had ample opportunities to learn and be apprised of its close proximity to the track, and the danger of passing the same in his cab when leaning out and looking in an opposite direction from the chute, as it appears he did, and what care was necessary to be exercised to escape injury therefrom when passing it. The fact that the jury found that he did not know and could not know of the hazard to which he would be subjected in passing the chute in the manner he did, at the time of his fatal injury, has no bearing upon the question of care upon his part. It is a finding which is antagonized by the specific facts disclosed by the verdict, and we must accept them as controlling under such circumstances. In addition to the duty resting upon the deceased to employ or exercise his senses while on duty, he, by the express provisions of the rule above set out, was admonished and enjoined to do so, and to take time, and to exercise care to protect himself from danger.

It is urged by the appellee that the facts show that her decedent did not know what distance the part of the chute which struck him was from the passing engine. In answer to this it may be said that the means of knowing by ordinary care is evidence of knowledge. *McKee v. Railroad Co.*, 83 Iowa 616, 50 N. W. 209; *Pennsylvania Co. v. Finney* (Nov. term, 1895), 42 N. E. 816. In the former case it was held that a railroad employee, in going over the line of the railroad in the discharge of his duties, will be presumed to have known,

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from such opportunity, that the distance between a wing fence and a passing car was such as to make it unsafe to swing out more than two feet from the car. In the latter case the alleged negligence was based upon the company having located and maintained a water crane in close proximity to its main track, whereby Finney, who was a brakeman in its service, was killed by being struck by the crane while descending from the car upon which he was braking. The employee in this case was 22 years of age. He had been in the services of the company for a period of 6 months, during which time he had passed the crane almost daily. It was held by this court that, under the facts in that case, the deceased was chargeable with contributory negligence. The court said: "Everything, as it appears, was open and visible to the decedent. He was a man 22 years of age, and, had he used his senses and faculties with which it is presumed nature had endowed him, we think he would have escaped the danger to which it is contended appellant had exposed him. The means which a person has of knowing that, under the circumstances, he will expose himself to peril, are deemed in law to be evidence of knowledge of that fact. *Muldowney v. Railroad Co.*, 39 Iowa 620; *McKee v. Railway Co.*, 83 Iowa 616, 50 N. W. 209. In *Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741, this court said: 'The law requires that men shall use the senses with which nature has endowed them, and when, without excuse, one fails to do so, and is injured in consequence, he alone must suffer the consequences.' See *Stone Co. v. O'Brien* (Ind. App.) 40 N. E. 430. In no case will the master be held liable to the servant where the latter brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence. *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. 187." The facts in the Finney Case, *supra*, are similar in their character to those in this appeal, and the holding in that case is virtually decisive upon the question here involved. In the case of *Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30, it is said: "An employee who

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knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, *is presumed to have assumed* all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby." (The italics are our own.) See *Lovejoy v. Railroad Corp.*, 125 Mass. 79; *Brown v. Railroad Co.*, 69 Iowa 161, 28 N. W. 487. We are of the opinion that, under the facts as they are disclosed by the finding in this case, knowledge of the hazard or danger, to which it is claimed by the appellee that her intestate was subjected and exposed by reason of the location of the cattle chute, and the manner in which it was maintained, must be imputed to him. It is not made to appear, by any reasonable inference that may be drawn from the specific facts found, that there was freedom from contributory negligence upon the part of the deceased at the time of the accident. The special verdict does not support the judgment. The judgment of the lower court is, therefore, reversed, and the cause remanded, with instructions to the court to vacate its judgment, and render a judgment in favor of appellant upon the special verdict.

HOWARD, J. (dissenting). I think that the facts found by the jury show that the company was negligent, and that the deceased was free from contributory negligence, and must, therefore, dissent from the conclusion reached by the court.

Martin v. Atchison, &c., R. Co.

MARTIN

v.

ATCHISON, T. & S. F. R. Co.

(Supreme Court of the United States, April 5, 1897.)

Fellow Servants—Negligence.*—A section hand in the employ of a railway company is the fellow servant of the section foreman and of employees of such company in charge of one of its trains, and cannot recover of the company for injuries received through the negligence of such foreman and employees.

IN ERROR to the Supreme Court of the Territory of New Mexico.

Neill B. Field, for plaintiff in error.

E. D. Kenna and *Robert Dunlap*, for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was brought by the plaintiff in error to recover damages for injuries sustained by him by being run over by a train on a railroad belonging to the defendant, near Albuquerque, N. M. The case was tried before a jury in the district court of the Second judicial district of that territory, and resulted in a verdict for the plaintiff in the sum of \$8,000. Judgment having been entered, the railroad company took the case by writ of error to the supreme court of the territory, which court reversed the judgment and directed judgment for the railroad company, and for costs against the plaintiff, who thereupon sued out a writ of error from this court, and the case is now here for review.

**Section Boss and Hand—Fellow Servants.*—See *Gavigan v. Lake Shore, &c., R. Co.*; 5 Am. & Eng. Corp. Cas. N. S. 523, and extensive note 530.

On the trial evidence was given showing substantially the following facts: The plaintiff had been employed by the railroad company at Albuquerque, N. M., as a common laborer, "fixing the road, straightening out the rails, and fixing ties wherever required." He was about 39 years of age, and had been so employed by the company, through one of its section foremen, for several months prior to the happening of the accident. He was under the orders of the section foreman, and was to do what the foreman told him. The section foreman was employed by the roadmaster, and the foreman employed the men. The roadmaster directed the section foremen what work to do and where to do it. He laid out the work for them, and told them what to do. The section foremen employed the men, and saw that they did the work properly. If the foreman thought a man ought to be discharged, he would see the roadmaster, or send him a request that the man should be discharged, and the roadmaster had the power to discharge him. The men under the section foreman, like the plaintiff, were paid by the agents of the company, who came along the line in a pay car.

On June 5, 1889, while the plaintiff was thus employed, he came to the station at Albuquerque about 6:45 o'clock in the morning for the purpose of going to his work on a hand car with one Mares, his co-laborer, and Charles Smith, his section foreman. The place where they were to work was about 8 or 9 miles north from Albuquerque on the line of the road. A few minutes before 7 the party, consisting of the section foreman, Mares, and the plaintiff, started on a hand car for the place where they were to work during the day. They went north upon the road for 300 or 400 yards, and there the car was stopped, and the men got off and procured a barrel of water, which was placed on the car, and the men again started north to continue their ride. All three men worked the crank on the hand car, but just as they started Mares said to the foreman that he thought the work train seemed to be starting from Albuquerque towards them. The track

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at that point was straight, and the view to the station was unobstructed. Plaintiff then turned his head backward towards the station, when the foreman told him not to do that; that he had no business to do it; that it was not his business to watch for trains; and that he, the foreman, would take care of that. Plaintiff thereupon turned his head away from the station, and continued to look north, the way they were going. They worked the crank so that the car was going as rapidly as they could make it, all three men having their heads turned towards the north. In the meantime a work train backed out from the station at Albuquerque, going north, and continued backing rapidly until it was moving at the rate of 17 or 18 miles an hour. Before the men on the hand car had proceeded very far along the road they were overtaken by the work train, which ran over them, killing the foreman and badly injuring the plaintiff and Mares. Neither of the latter had heard the approach of the train. It was under the management of a conductor, and at that time there was a roadmaster on the train who had control of the line of road where the accident occurred. He was not in charge of the running of the train, but the train went to different points on the road as he had occasion to visit them for working purposes. Some of the hands on the work train saw the hand car a short distance before it was struck, and one of them tried to communicate with the engineer of the train, but failed. No one on the hand car was looking backward, or saw the approach of the work train.

It was claimed in the petition on the part of the plaintiff that the accident occurred from the neglect of the conductor and of the hands on the work train, and also by reason of the neglect of the section foreman on the hand car with the plaintiff in ordering plaintiff to face north while working the car, and in not keeping a lookout himself for the approach of the train from behind.

The defendant had filed a plea of not guilty.

Upon the trial of the action, after the evidence for

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both sides had been introduced, and each side had rested the case, the defendant moved the court "to instruct the jury to find for the defendant, upon the ground that the negligence, if any, through which the plaintiff was injured was the negligence of the fellow servants of the plaintiff, for which the defendant is not liable." After hearing arguments, the court overruled the defendant's motion, and counsel for the defendant then and there excepted.

After the verdict for plaintiff had been rendered, and judgment entered thereon, the defendant obtained a writ of error from the supreme court of the territory to review the rulings of the district court. Various assignments of errors were made, and among them was the eighth, which reads as follows: "The court erred in not sustaining defendant's motion to instruct the jury to find a verdict in favor of the defendant, and the defendant not guilty."

The supreme court held that whatever negligence was proved, as against the employees of the defendant, such negligence was that of fellow servants with the plaintiff, and on that ground the judgment was reversed, and judgment ordered in favor of the defendant, with costs.

The plaintiff seeks here a reversal of the last judgment.

We think the decision of the supreme court was right, and that the judgment entered thereon must be affirmed.

The cases of *Railroad Co. v. Baugh*, 149 U. S. 368; *Railroad Co. v. Hambly*, 154 U. S. 349; *Railroad Co. v. Peterson*, 162 U. S. 346; and *Railroad Co. v. Charless*, 162 U. S. 359,—cover this case in all its aspects, and render it entirely clear that the employees of the defendant herein, whose negligence caused the injury to the plaintiff, were his fellow servants at that time, and hence the defendant cannot be held liable to plaintiff for the injuries sustained by him as a result of that negligence.

The counsel for the plaintiff has argued before us

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that the defendant must be held responsible because the plaintiff had been directed by the foreman, under whose orders he was placed, to look north while he was on the car, and had received the foreman's assurance that he (the foreman) would warn him of the approach of danger, and that as the foreman failed to do so, it was the failure of the defendant to do something which it was bound as a master to do in furtherance of the obligation it was under to see that the plaintiff had a reasonably safe place in which to perform his work. We do not perceive that the doctrine as to the duty of the master to furnish a safe place for the servant to work in has the slightest application to the facts of this case. There is no intimation in the evidence, nor is any claim made, that the hand car upon which the plaintiff was riding was not properly equipped and in good repair, and in every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit, in and of itself, from the station at Albuquerque to the point where the plaintiff was going to work. The negligence of the section foreman in failing to note the approaching train, and to give the proper warning, so that the car might be taken from the track, was not the neglect of the defendant in regard to the performance of any duty which, as master, it owed the plaintiff. If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south.

Upon an examination of the cases above cited it will be found that the principles therein laid down clearly and plainly cover this case.

The judgment must be affirmed.

MR. JUSTICE HARLAN dissents.

Denver & R. G. R. Co. v. Sipes.

DENVER & R. G. R. Co.

v.

SIPES.

(*Supreme Court of Colorado, Nov. 16, 1896.*)

Injury to Employee—Fellow Servants—Negligence.—The switch to a side track, on which a freight train was standing, was negligently left open by employees of the railway company, thereby derailing an incoming passenger engine and causing the death of the fireman of such engine. Under the rules of the company it was the duty of the conductor of the freight train to see that the switch was properly arranged. The switch was safe and sufficient, and the company had exercised the requisite care in selecting the conductor and brakeman whose duty it was to operate it. *Held*, that the conductor was not the vice-principal of the company, but the fellow servant of the fireman, and that the company was not liable for the death of such fireman.

General Verdict upon Distinct Issues—Error.—Where in such action the complaint charges two acts of negligence upon the company, both issues being submitted, and the verdict of the jury being general, such verdict cannot be sustained on appeal if there was error in the charge of the court, as to either one of the issues.

ERROR to Arapahoe county district court. *Reversed.*

This is an action brought by Hattie Sipes to recover damages for the death of her husband, George Sipes, who was killed on the night of May 7, 1890. His death was caused by the derailing of an engine upon which he was engaged in the line of his duty as fireman, while in the service of the defendant company. The accident occurred near a place called "Fountain," where the company, in the operation of its road, had a side track for the purpose of allowing its trains to pass. The engine upon which deceased was employed was pulling a passenger train going south. A few moments prior to the arrival of his train a freight train going north had reached this point, and had gone onto the side track for the purpose of allowing the passenger train to pass. In order to enable

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it to do so, the forward brakeman on the freight train had opened the switch at the south end of the side track, and left it to be closed by the rear brakeman, who, being at the time asleep in the caboose, neglected to do so. The fireman of the freight train had covered the headlight on his engine to indicate to the coming passenger train that all was right. The red light customarily kept in the caboose of the freight train had been left several days previous at the company's shops to be repaired, and which, by the rules of the company, when displayed, signified danger, and was a signal for any approaching train to stop. The passenger engine passed the freight train, ran into the open switch, and Mr. Sipes was killed. Verdict and judgment in favor of plaintiff for the sum of \$5,000. To this judgment defendant prosecutes this writ of error.

Rule 117 of the company provides: "Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen, except where switch tenders are stationed." *Inter alia*, the court instructed the jury as follows: "(3) If you find that under the rules of defendant that were in existence at that time, and by which its trains were operated, that it was the duty of the conductor of the freight train going north to see that the switch was closed at the side track on which he placed his train, and that said conductor had exclusive charge and control of said freight train, and had command and control of the train hands on said train, and that he failed to see that said switch was closed, but negligently left it open, or negligently allowed it to be left open, and on account of such negligence of said conductor the accident occurred which resulted in the death of said George Sipes, then the negligence of the conductor would be the negligence of the defendant company, and the defendant cannot claim protection on the ground that said conductor was a co-servant or fellow servant of said George Sipes." And refused the following, asked by the defendant: "(7) The trainmen upon the freight train were fellow servants with the deceased, who was

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fireman on the other train, and for their negligence the defendant is not liable to this plaintiff." Upon the giving and refusing of these instructions defendant assigns error. Error is also assigned to the giving of other instructions touching the liability of the company for failure to furnish customary signal lights, which, in our view of the case, it is unnecessary to consider upon this review.

Wolcott & Vaile and *H. F. May*, for plaintiff in error.

Stuart & Murray, for defendant in error.

GODDARD, J. (after stating the facts). It is undisputed that the switch at the south end of the side track was negligently left open by the employees of the company, and that the derailment of the engine upon which the deceased was employed was caused thereby. It may also be conceded that under the rules of the company the conductor in charge of the freight train was responsible for that neglect. The question, therefore, of the liability of the company for such neglect on his part, is squarely presented, and the correctness of the law given by the court below upon this branch of the case is the principal question presented for our determination; and that is whether a railroad company is liable for the injury to an employee on one of its trains, caused by the negligence of a conductor on another train in leaving a switch open that it was his duty to see closed. The solution of this question depends upon whether the default on his part consisted in a dereliction of duty imposed by law upon the company, or is one the performance of which it may delegate to another. If the former, the company is liable; if the latter, the rule that exempts the employer from liability for the negligence of a fellow servant applies. The personal duties that the law imposes upon the master are well defined and understood, and are such as relate to the furnishing and keeping in repair of reasonably safe machinery and appliances for carrying on his business; a reasonably safe place in which to ren-

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der the service, and the exercise of reasonable care in the selection of competent co-workmen; in brief, such acts as pertain to construction, preservation, and management, as distinguished from the work of operation. *Railway Co. v. Needham*, 11 C. C. A. 56. The master having properly performed these duties, the risk that the machinery and appliances will be carefully operated by his co-employees is assumed by the servant. This rule is stated by Mr. Bishop in his work on Non-Contract Law (section 665) as follows: "As between master and servant, the duty of planning a business, and all duties pertaining to the safety of the service,—such as the place to work, the implements and machinery, the plans and rules after which the work is to be conducted, the choosing of the fellow servants, and whatever else is within the same reason,—must be discharged either by the master in person, or by a vice-principal for whose neglects and other wrongs therein he will be responsible as for his own. On the other side, the running of the business with and in pursuance of the plans, rules, appliances, helps, and helpers thus provided—in other words, the execution of the work—is of the assignable sort, rendering all persons engaged therein fellow servants, so that, if the master used due care in selecting his servants, he will not be responsible to one for an injury produced by the negligence or other default of another." In this case there is no claim that the company failed in its duty to furnish a safe and sufficient switch, or to exercise the requisite care in selecting the conductor and brakeman whose duty it was to operate it; but, on the other hand, it appears that through their neglect to properly adjust it the injury was caused. It is insisted, however, that under the doctrine announced in *Railroad Co. v. Discoll*, 12 Colo. 520, and *Railroad Co. v. Nylon*, 17 Colo. 501, the conductor occupied the position of vice-principal, or *alter ego* of the company; and hence his negligence in this particular instance was the negligence of the company. We do not think that the rule therein an-

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nounced supports this conclusion. In those cases the negligence that caused the injury consisted in the failure to properly perform a duty that the law imposed upon the company, and not in the negligent performance of an assignable duty, as in this case. In the case before us, the accident is not attributable to the negligence of the conductor in the discharge of a duty in his capacity as the company's representative, but to his failure to see that a brakeman properly attended to his duty. The rule of the company making it his personal duty to see to the proper adjustment of the switches used in operating his train did not change the rule of law which governed the relations of the parties concerned, or take the handling of switches out of the category of assignable duties; and if, in the absence of such a rule, the company would not be liable for the negligence of a switch tender or a brakeman whose duty it is to perform such service, the adoption of such a precautionary measure, intended to better insure the performance of such duty by the brakeman, would not impose such a liability. *Miller v. Southern Pacific Co.*, 20 Or. 285. The specific act in connection with which the negligence occurs is the criterion by which the liability of the company is fixed, rather than the rank of the servant who performs the act. As was said in *Railway Co. v. Naylor*, *supra*: "The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured, does not alone fix the master's liability. The general powers vested in the superior servant, and the character of the specific act in connection with which his negligence occurs, are considerations rarely, if ever, omitted in pursuing the inquiry. The accepted general rule is that where the negligent agent or servant can fairly be said to take the place of the master, and represent him, so as to become in reality a vice-principal, and the negligence occurs in the discharge of his representative duties, the master's liability may attach." As was also said in *Drainage Co. v. Fitzgerald*, 21 Colo. 533. "The better rule, as

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we extract it from the best-reasoned cases, is that for the acts of the vice-principal, done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, the master is liable; while for all such acts as relate to the common employment, and are on a level with the acts of the fellow laborer, * * * the master is not responsible. In other words, the test of liability is the character of the act, rather than the relative rank of the servants." Our conclusion is that the negligence of the conductor in leaving the switch open was that of a fellow servant of the deceased, and for which the company is not liable. *Railway Co. v. Needham*, *supra*; *Naylor v. Railroad Co.*, 33 Fed. 801; *Roberts v. Railway Co.*, 33 Minn. 218; *Harvey v. Railroad Co.*, 88 N. Y. 481; *Slattery's Adm'r v. Railroad Co.*, 23 Ind. 81; *Walker v. Railroad Co.*, 128 Mass. 10; *Miller v. Railway Co.*, *supra*; *Brown v. Railroad Co.*, 68 Cal. 171.

But it is said that, if the court erred in its instructions upon this point, such error is without prejudice, since the company is, in any event, liable for its failure to furnish a proper signal lamp. To this we cannot agree. The complaint charges two acts of negligence upon the company,—the failure to furnish the cupola light, and the failure of the conductor to close the switch. Both issues were submitted, and, the verdict of the jury being general, we cannot say upon which it was founded. Upon the testimony, the jury might have found that the absence of the signal light in no way contributed to the injury, but that it resulted solely from the negligence of the conductor in leaving the switch open. "A general verdict upon distinct issues raised by several pleas cannot be sustained if there was error as to the admission of evidence, or in the charge of the court, as to any one of the issues." *State v. Baldwin*, 112 U. S. 490. For the reasons given, the judgment of the court below must be reversed, and the cause remanded. Reversed.

Thompson v. Chicago & E. R. Co.

THOMPSON

v.

CHICAGO & E. R. Co.

(*Supreme Court of Indiana, Dec. 24, 1896.*)

Injury to Employee—Fellow Servants.*—A machinist's helper, in the employ of a railway company, was directed by the machinist, under whose orders he was working, and who could dismiss him, to lift a heavy piece of machinery, the latter promising to help him. The helper obeyed, but the machinist failed to aid him, and he strained himself severely, suffering a rupture. It appeared that the order was given in violent and abusive language. *Held*, that the fact that the machinist had power to direct and to dismiss the helper did not render him a vice-principal of the company, but that he was a fellow servant of the helper, and that the company was not liable for the latter's injuries.

APPEAL from Huntington county circuit court. *Affirmed.*

Sayler & Sayler, for appellant.

W. O. Johnson and *Kenner & Lesh*, for appellee.

HACKNEY, J. The sufficiency of the appellant's amended complaint is the only question presented by the record. It alleged: That he was an employee of the appellee in its machine repair shops in the city of Huntington, working as a machinist's helper under one Grover, a machinist in appellee's employ. That he was subject to the directions of Grover, and was liable to dismissal from the service if not obedient to him. That Grover "was a very quick-tempered and passionate man, which the defendant, at the time it employed him in authority over the plaintiff, could have known, and did know, but, notwithstanding such knowledge, and disregarding the health and safety of its other employees, and particularly this plaintiff," it employed Grover, and put him in authority of the appellee. That

*See note at end of case.

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it became necessary to place the heavy cover of a steam chest in position upon a locomotive, and for that purpose appellant was directed to lift one end, while two others should lift the other end, and while said Grover would stand upon the guards of the locomotive to receive the cover when lifted up to him. The appellant objected to the lifting against two men; when Grover said that he would stoop down and aid in the lifting, "and with violent and profane language, and with violent manner, ordered the plaintiff to lift said steam-chest cover. Said violent manner and said violent and profane language of the said Grover produced in the mind of the plaintiff great excitement and concern that he was in danger of losing his said employment," and by reason thereof, and in reliance upon the promised assistance from Grover, he did lift said cover, and said Grover did not lend him any assistance. That, as the result of said lifting, he was severely strained, and suffered a rupture. It is alleged, also, that Grover knew that such lifting was dangerous, and that the appellant did not know that it would injure him; and the pleading concludes, after an allegation that the appellee, with knowledge of appellant's injury, discharged him, and refused to give him employment, that the occurrence was without appellant's fault or negligence, and "was caused by the negligence and fault of the defendant, as herein set out."

The two inquiries which must control the question presented by the complaint in review are these: Was Grover a vice principal? Or, if not, was the appellee negligent in employing or retaining him in his service? The learned counsel for the appellant stoutly maintain that Grover was a vice principal. The rule in this state, now firmly settled, is that a difference in rank or the power to control and direct or to discharge from service is not the test as to whether one is a fellow servant or a vice principal. The controlling inquiry must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant. *Coke Co. v. Peterson*, 136 Ind.

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398; *Spencer v. Railway Co.*, 130 Ind. 181; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Railway Co. v. McMullen*, 117 Ind. 439; *Railway Co. v. Dailey*, 110 Ind. 75; *Railway Co. v. Stupak*, 108 Ind. 1; *Railway Co. v. Adams*, 105 Ind. 151; *Car Co. v. Parker*, 100 Ind. 181; *Coal Co. v. Cain*, 98 Ind. 282. What duty of the master is shown by this complaint to have been neglected? One argument of counsel is that the appellee was obliged to supply a safe working place and safe machinery and appliances. True, but that duty was not alleged to have been omitted. "Safe working place and safe machinery and appliances" do not mean that heavy steam-chest covers may not be put in place, because the doing of it involves hazard, from the mere weight required to be lifted. The act alleged to have directly resulted in injury was that of requiring the appellant to lift beyond his strength, and that act is alleged to have been one of the servant Grover. The act did not involve the supplying of a place to work, or the instrumentalities of the service, but consisted in the manner in which several servants employed a proper instrument of the service. Unmistakably, the appellant and Grover were fellow servants, and there was no liability of the appellee without some negligence on its part not consisting alone in the act of Grover.

It is more than doubtful if any negligence is attempted to be alleged against the appellee, since the only charge of negligence is that with which the complaint concludes. If, however, that should be held to characterize as negligent every connection of the appellee with the occurrence as alleged, we should have the single inquiry as to whether a master employing a servant who is a "quick-tempered and passionate man" is liable in damages for the remote consequences of that servant's evil use of his tongue. Counsel for appellant do not seek to affirm any such liability, and such is not the theory of the pleading. Nor do the allegations suggest that Grover was an unskilled or habitually negligent servant, nor that the company had

Notes.

any reason to believe that he was not fully acquainted with and competent to perform all of the duties of his employment. The failure of Grover to lend a helping hand, as he had promised, was not chargeable as negligence against the appellee, but was an omission by a fellow servant of the appellant. The allegations as to the fear in which Grover placed the appellant by his angry and profane language, even if that condition of mind excused the appellant from doing that which he knew to be dangerous, and that which he had refused to do because of his own judgment that his strength was not equal to it, are a doubtful answer to the requirement of noncontributory negligence on his part. But, if they were a complete answer, the fact would yet remain that the whole occurrence was due to the negligence of a fellow servant in overestimating the physical strength of the appellant, and in failing to assist him in bearing a burden. The fellow-servant rule must be held to defeat the appellant's cause of action. The judgment of the circuit court is affirmed.

NOTES.

Machinists—Fellow Servants.—In *Gonsior v. Minneapolis, etc. R. Co.*, (Minn.) 31 N. W. Rep. 515, it was held that a machinist's helper, working in the roundhouse of defendant company, was a fellow servant of the foreman of the roundhouse.

In *Atchison, etc. R. Co. v. McKee*, 37 Kans. 392, it was held that the superintendent of machinery in the car shops of a railroad company whose duty it was to inspect, repair, and provide machinery for others to operate, was not a fellow servant of an employee in the car shops.

In *Murphy v. Boston, etc. R. Co.*, 88 N. Y. 146, a mechanic and a boilermaker in the shops were held fellow servants.

A blacksmith and his assistant, working together in a railroad company's shops, were held fellow servants in *Michigan Central R. Co. v. Gilbert*, 46 Mich. 176, 2 Am. & Eng. R. Cas. 230.

The Iowa statute rendering railroad companies liable for accidents caused by the negligence of co-employees does not extend beyond persons engaged in the business of operating railways, and is not intended to embrace all persons who are employed by the corporation, without regard to their employment. *Potter v. The C., R. I. & P. R. Co.*, 46 Iowa 399, machinists for example.

Whether or not the negligence of the superintendent of a repair shop was the negligence of the company was a mixed question of law and fact to be determined by the jury, under proper instructions of the court. *Potter v. The C., R. I. & P. R. Co.*, 46 Iowa 399.

Harding v. Chicago, &c., R. Co.

HARDING

v.

CHICAGO, M. & ST. P. R. Co.

(*Supreme Court of Iowa, January 25, 1897.*)

Killing of Stock—Negligence.*—The sectionmen of a railway company passing a gate at a crossing which was open closed it, and started to work at a place 55 rods away from the gate. The person on whose land the gate was, passed through afterwards and left the gate open, and the cattle of the plaintiff which had escaped into a field of the former went through the gate on the track and were killed. *Held*, that the railway company was not guilty of negligence.

APPEAL from Chickasaw county district court. *Affirmed.*

J. R. Banc, for appellant.

J. W. Sandusky, for appellee.

DEEMER, J. Richard and John Donovan are the owners of 180 acres of land in Chickasaw county. The south part of this tract is cut off from the main body thereof by the defendant's right of way, and about 100 yards south of this right of way, and on the south side of the Donovan tract of land, is a county highway. The railway company provided a crossing for the Donovans over its right of way, supplied with gates on either side thereof. A gate also leads from the highway into the Donovan land. At the time the stock was killed plaintiff was occupying a piece of land cornering diagonally to the southwest with the Donovan land. On the 14th day of December, 1893, some of plaintiff's stock escaped from his field into the highway, from thence they went through open gates from the highway onto the Donovan land, and from there onto the defendant's right of way, where they were killed by a train.

*See note at end of case.

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The accident occurred some time after 3:30 o'clock p. m. The plaintiff claims that defendant was negligent in leaving the gate leading to its right of way open, and in failing to take proper care with reference to the same. The undisputed evidence shows that defendant's section men passed this gate about 7:30 a. m., found it open and closed it. They again passed over the crossing some time between 3 o'clock and 4 o'clock p. m., and again found the gate open. They closed it a second time and passed on east to a culvert about 55 rods east of the crossing, where they stopped to repair it. At this work they were engaged about half an hour. After repairing the culvert they proceeded on east to the place where they were stationed, arriving there about 6 o'clock p. m. While the section men were engaged at the culvert the Donovans passed over the right of way crossing with a load of hay. They neglected to close the gate after they passed through, and plaintiff's stock reached the track through the negligence of the Donovans in failing to close the gate.

The sole question to be determined on this state of facts is, was the defendant negligent in failing to learn of and close the open gate? Plaintiff's counsel argues that it was, because the gate was in plain sight of the section hands at all times while they were at work at the culvert, and that they failed to observe the open gate. There is some conflict in the evidence regarding the question as to whether the section men could see the gate from the place where they were at work. But, in view of the fact that the court directed a verdict, we must assume, for the purposes of the case, that these men who were engaged at the culvert could have seen the open gate had they looked. Were they negligent, then, in failing to observe that the Donovans had left the gate open under the conditions recited? We think not. They had closed the gate near 4 o'clock, and passed on to their work, which, the record discloses, demanded their entire attention. They were raising the culvert, and were bound to keep a lookout for passing trains, and to do their work as quickly and expeditiously as

Notes.

possible. They had the right to assume that no trespasser would open a gate they had so recently closed, and were not obliged to go back again over the entire line they had so recently traversed for the purpose of ascertaining whether some one had opened up the gates they had just closed. Let us assume, however, that they saw, or were bound to see, the Donovans when they left the gate open. Would they, then, be guilty of negligence? The Donovans were the owners of the land. They had a right to leave these gates open temporarily, and the section men had the right, had they seen them pass through the gate, to assume that they would soon return and close it. The defendant's employees were not bound to remain on guard to determine whether the Donovans would return and do their duty. At the time they left the culvert, they had the right to assume that the gate would be closed by the men who left it open, and were not required to remain to see if they did. We do not think the defendant was guilty of negligence. The judgment is affirmed.

NOTES.

Gates Left Open by Landowner.—A landowner whose farm is divided by a railroad is entitled to necessary crossings; and where the railroad company fences its track through his farm, and constructs gates in the fences at such crossings for the accommodation of the landowner or his tenant, the duty rests upon him to keep the gates closed; and if he neglects to do so, and his animals pass through them upon the track and are killed, without the negligence of those operating the trains, the company is not liable for the loss. *Adams v. Atchison, T. & S. F. R. Co.*, 49 Am. & Eng. R. Cas. 579, 46 Kan. 161, 26 Pac. Rep. 439; *Illinois C. R. Co. v. McKee*, 43 Ill. 119; *Jeffersonville, M. & I. R. Co. v. Dunlap*, 31 Am. & Eng. R. Cas. 512, 112 Ind. 93, 13 N. E. Rep. 403.

It appearing that the track-walker, an employee of the company, had shut the gate in question—one constructed for the adjacent farm-owner's convenience at a farm crossing—some time after mid-day, it was error to instruct the jury that the farm-owner was under no obligation to keep the gate closed. *Diamond Brick Co. v. New York C. & H. R. R. Co.*, 28 N. Y. S. R. 95, 7 N. Y. Supp. 868, 5 Silv. Sup. 321, 55 Hun 605, mem.

Same—Cattle of Third Person.—Where the animals of a third person jump into the inclosure, and are wrongfully upon the premises

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of an adjacent landowner, and then pass through the gate left open by such landowner, and are killed by a train, without the negligence of those in charge of the same, the owner of such trespassing animals is entitled to no greater rights than the landowner, and cannot recover from the company. *Adams v. Atchison, T. & S. F. R. Co.*, 49 Am. & Eng. R. Cas. 579, 46 Kan. 161, 26 Pac. Rep. 439; *approving Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.

And this rule is not affected by the fact that the railroad company has not complied with the general railroad act, with respect to fences at other points on the railroad. *Brooks v. New York & E. R. Co.*, 13 Barb. (N. Y.) 594; *approving Waldron v. Saratoga & W. R. Co.*, 8 Barb. 390; *approved in Cecil v. Pacific R. Co.*, 47 Mo. 246. *Distinguished in Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397. *Not followed in Corwin v. New York & E. R. Co.*, 13 N. Y. 42. *Quoted in Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172; *Dent v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 496; *Omaha & R. V. R. Co. v. Severin*, 30 Neb. 318.

BAXTER

v.

LOUISVILLE, N. A. & C. RY. CO.

(*Supreme Court of Illinois, Jan. 19, 1897.*)

Action on Contract for Carriage of Stock—Pleading.—In an action brought against a railway company on a contract for the carriage of stock to recover damages for injury to such stock, if the declaration is defective in not averring compliance with the condition in the contract precedent to recovery of damages, such defect should be taken advantage of by demurrer, and cannot be made the basis of a motion to instruct the jury to find for the defendant.

Contract of Transportation of Stock—Limitation of Carrier's Liability—Notice of Claim for Damages—Reasonableness.*—Stock was shipped over a railway to a point several hundred miles beyond the terminus of such railway, and the railway company had no agent or officer at or near such point. The contract of shipment limited such company's liability to damages arising on its own line. The contract provided that as a condition precedent to recovery of damages for loss of or injury to such stock that the shipper should give notice to some officer of the company or to its nearest agent before the animals were removed from the station at their destination, and before they were mingled with other stock. *Held*, that such provision was unreasonable.

**Note.*—See note to *Kansas, etc., R. Co. v. Ayers*, next case reported in this volume.

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APPEAL from First district appellate court. *Reversed.*

Bulkley, Gray & More, for appellant.

G. W. Kretzinger, for appellee.

WILKIN, J. Appellant sued appellee in the circuit court of Cook county for a failure to safely carry certain live stock from Chicago to Richmond, Va., under a contract of shipment, evidenced by three receipts, in writing, dated September 28, 1891, signed by the agents of the respective parties. At the close of plaintiff's evidence the defendant made the following motion: "Defendant moves the court to instruct the jury to return a verdict for the defendant, because the plaintiff has failed to allege or prove compliance on his part with an express provision, contained in the contract sued on, requiring him to make his claim for damages in writing in the manner and within the time by said contract provided, and that no such claim was made in writing by the plaintiff at any time before the commencement of this suit, or by any one on his behalf, and no claim whatever, as required in this portion of the contract, is averred in the declaration or shown by the evidence." After hearing the argument, the motion was sustained, and the jury was instructed to return a verdict for the defendant, and, this being done, judgment was entered against the plaintiff for costs of suit. The appellate court having affirmed that judgment, this appeal is prosecuted.

Case Stated.

The provision in the contract on which the motion was based is as follows: "And for the consideration before mentioned the said party of the second part further agrees that, as a condition precedent to his right to recover any damages for loss and injury to said stock, he will give notice in writing of his claim thereof to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, and from the place of delivery of the same to said party of the second part, and before such stock is mingled with other

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stock." There is no allegation in the declaration of compliance with this provision, nor of excuse for failure to do so. Neither was any direct proof of such compliance or excuse offered upon the trial. But plaintiff's sole reliance was and is that said condition is unreasonable, and therefore void. The defendant's contention is that, while the plaintiff might have declared against it upon its common-law liability, and insisted upon the invalidity of this condition, yet, having elected to declare *in assumpsit* upon the contract, he was bound to treat it as a whole, and is concluded by this as well as all other terms and conditions therein agreed upon; also, that, having himself offered the contract in evidence, he cannot now be heard to question the validity of any part of it. It is the settled law, at least in this state, that a common carrier, by contract with the shipper, fairly entered into, may limit the time within which claims for damages for injury to the goods shipped shall be made, provided the time and conditions in the requirement are reasonable. Thus, it was held, in *Black v. Railway Co.*, 111 Ill. 351, that a condition in a contract of shipment that any claim for loss or damage should be made in writing, etc., and delivered to the general freight agent of the company at St. Louis, within five days from the time the stock was removed from the cars, was a reasonable and valid condition; and this case, with others, is relied upon as sustaining the reasonableness of the condition here under consideration.

The first question, however, to be determined upon the argument of counsel, is, could the plaintiff below, appellant here, in view of his declaration and proof, raise the question of reasonableness and validity of the condition named? It is said by Hutchinson, in his work on Carriers (section 574): "So, if the plaintiff sue upon the contract, he must state the whole of it. If, for instance, there are embodied in it limitations of the liability of the carrier, they must be stated." And illustrations are there given of the application of the rule. In the following sections he states the reas-

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ons for requiring such particularity in the declaration, but in section 756 says: "But a mere collateral provision, distinct from that portion of the contract which qualifies the liability of the carrier, and which contains 'the entire consideration for the act, and the entire act which is to be done,' need not be stated; as, for instance, a provision which recites only the manner in which the damages shall be liquidated after a right to them has accrued by a breach of the contract, or a notice that the carrier was not to be liable beyond a certain amount unless the goods were entered and paid for, as being above that value. A provision of the former kind would be merely collateral to the main contract, which would be to carry the goods; and the former would be no part of the express contract to carry, although it might have the effect of the contract in estopping the owner of the goods from claiming a greater sum,"—citing *Clarke v. Gray*, 6 East 564. And he further says: "And such words would be a condition in the contract that, unless demand or claim were made for the loss within a certain time after its occurrence, or after the date of the shipment, the liability of the carrier should cease." We understand that *Wetzell v. Dinsmore*, 4 Daly 194; *Express Co. v. Loeb*, 7 Bush. 501, and the text quoted from *Lawson on Contracts of Common Carriers* (section 354), cited by counsel for appellee, are not in conflict with the rule thus announced. In the first case, speaking of the contract of shipment offered in evidence, the court said: "If it is to be used at all as an instrument of evidence on his part, it must be taken altogether, and the contract quoted from all that is contained in it;" that is to say, all the terms of the agreement which constituted the contract of shipment as to its terms and limitations. But it does not follow that mere collateral provisions, as this is termed, must be either pleaded or considered in determining the contract. In the Kentucky case the decision turned upon the refusal of the trial court to instruct the jury that, if the parties agreed that the company was not to be liable unless the loss was caused

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by fraud, etc., before plaintiff could recover, they must prove the fraud; and the court said, speaking of the special contract of shipment: "That contract is made the foundation of appellee's action. They sue upon it, and make it a part of their petition; and, so far from there being any allegation that it was not fairly made, or that it was obtained by duress, imposture, or delusion, it is fully recognized by appellees as obligatory, and made the basis of their recovery in this action. By this special contract the appellant's responsibility as a common carrier under the rules of the common law was relaxed, and, under the rulings of this court in *Express Co. v. Nock*, 2 Duv. 562, in the absence of any allegations calling in question its fairness or binding force, it must be regarded as obligatory." It was accordingly held that the refusal of the instruction was reversible error. But there, it will be seen, by the terms of the contract the liability for damages was limited to injury or loss caused by fraud; the question of fraud entering into the contract of shipment limiting the liability of the carrier. And so it will be seen that the class of cases referred to by Lawson (§ 254, *supra*) are those in which the question is whether the shipper assented to the exemption under which the carrier seeks to escape liability. The condition here relied upon by the defendant to defeat plaintiff's action is not that,

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Stock.

under the terms of the contract, he had no right to recover damages, but that his right of action for such damages is defeated because of a failure to give notice and claim them within a certain time. In other words, the reliance upon this condition presupposes that damages have been sustained within the terms of the contract of shipment, but that, by the provisions of this mere collateral requirement, they cannot be recovered. But, the declaration in this case having declared upon the contract, even if it ought to be held defective in not averring compliance with the condition, that defect should have been taken advantage of by demurrer, and could not, under any recognized rule of practice, be made the basis of a mo-

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tion to instruct the jury to find for the defendant. And so the question here must be, was the plaintiff conclusively bound by this provision, merely because he offered the whole contract in evidence? His position is that that part of the contract is unreasonable, and therefore void, and if, under all the proofs submitted, including the various terms of the contract, it should be so treated, manifestly he is not bound thereby.

The question, then, remains, is the provision void for unreasonableness? It appears from the authorities generally on this question that it must be determined from all the facts and circumstances of each particular case, and hence decisions are found holding substantially the same provision valid under one state of facts and invalid under another and different state of facts. The case of *Black v. Railway Co.*, 111 Ill. 351, and cases cited in 11 Ill. App. 465, with others, are relied upon by counsel for appellee as sustaining the provision. It will be seen that in the *Black Case*, and many of the others so relied upon, the carriage was by railroad companies over their own lines, and the requirement was to give notice to a particular agent, within a time fixed, as, in the *Black Case*, to the general freight agent in the city of St. Louis within five days. In other cases, as *Rice v. Railway*, 63 Mo. 314, and *Goggin v. Railway Co.*, 12 Kan. 416, where the condition was that notice should be given at or before the unloading of the stock, the place of delivery was upon the line of the carrier itself, and in both those cases the court takes into consideration the facts and circumstances surrounding the parties at the time. In the *Kansas case* it is said after stating the facts: "Under these circumstances, we cannot hold that the time when the notice was to be given was unreasonable. * * * Nor would such a notice be reasonable in the case of an ordinary shipper who did not accompany and superintend his stock, nor would it probably prevent a recovery for injuries sustained which would not readily be seen and actually should not be discovered until the

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time for giving notice had expired." It appears, from the contract sued upon in this case, that the line of the defendant terminated at Louisville, Ky., and its liability is limited to damages resulting from neglect of duty on its own line; the place of destination being many hundred miles beyond that terminus, and the carriage to be over connecting lines. It is fairly inferable, from all the facts introduced upon the trial, if not from the contract itself, that the defendant had no station agent at or near the place of destination, or any officer at that place; and, the question, therefore, is, is this provision, under the facts, so unreasonable and contrary to public policy as that it should be held unreasonable and void? "The place of destination above mentioned" was "Richmond, Virginia, station"; and hence the requirement, if valid, was that, before the animals were removed from that station, and before they were mingled with other stock, the shipper should give notice of his claim for damages. This, of course, to be of practical benefit to the defendant, meant more than a mere notice that damages would be claimed, but that the nature, character, and amount of such damages should be stated, so that the defendant might inquire into and investigate the claim before the stock was removed and mingled with other stock. The evidence shows that, upon the arrival, the horses were found to be in such a condition as that immediate attention and care was required to prevent additional and greater loss than had at that time been incurred; that it was necessary to feed, water, and care for the animals, and at as early a period as practicable remove them to pasture, there being no place at the station except the stock yard, in very bad condition, at which they could be kept. The particular person to whom notice was required to be given is not designated in the provision, but the shipper is left to hunt up, without any specific directions, "some officer of said party of the first part, or its nearest station agent"; thus making it his duty to keep the stock at the station, separate from other stock, until he could ascertain such officer or agent.

Contract for Transportation of Stock—
Limitation of Liability—Notice of
Claim for Damages.

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As was said in *Smither v. Railroad Co.* (Tenn. Sup.) 6 S. W. 209, of a stipulation identical with the one here in question: "The stipulation is uncertain and ambiguous. There is nothing by which it can be ascertained who is an officer, or what degree of agency or what relationship any individual must bear to the corporation to be one of its officers, or make his position an officer of the company. It does not give the name of the nearest station, or use such language as, by reasonable construction, will designate a single agent to whom notice shall be given, or which is the nearest station of several in a city, or at what terminus, etc. These things were known to the corporation, and should have been definitely set out, if they can be enforced at all. It is unreasonable in requiring the shipper to retain his stock at the place of destination or delivery, unmingled with other stock, until the written notice shall have been given. It is void because it undertakes to protect the carrier from losses occasioned by his own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to suit." The same doctrine is held in the case of *Coles v. Railroad Co.*, 41 Ill. App. 607, and the language of the court in that case is, we think, of forcible application to the facts in this case. It is true the supreme court of Kansas, in the case of *Sprague v. Railway Co.*, 34 Kan. 347, held otherwise; the provision in that case being also identical with the one here under consideration, and passed upon in the two cases last above cited. The facts, however, in that case, were essentially different, in that there the carriage was over the line of the defendant, and of course its nearest station agent to the place of destination was easily ascertained. That court does not, however, and we think no court could intelligently, hold that such a provision is, in and of itself, reasonable and valid, regardless of the facts and circumstances surrounding the parties to the contract. Here the defendant is insisting upon a contract limiting its liability to its own line, and at the same time on a stipulation in that con-

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tract requiring the shipper, as a condition precedent to his right to recover such damages, to give notice of his claim, at a place of destination upon another line, wholly disconnected from its own, to one of its officers, or its nearest station agent, no matter how remote from such place of destination. We think, under these facts, that the part of the provision which requires notice to "some" officer is unreasonable and uncertain, because it in no way indicates or designates what officer, or where he may be found, and the requirement that notice shall be given to the nearest station agent is impracticable of performance, because no means are given the shipper to ascertain who such agent is, or his station. The defendant had station agents along its line at various points from Chicago to Louisville. Which of these many agents would, under the terms of this provision, be regarded the nearest station agent, would, it must be conceded, be a matter of very difficult ascertainment. It might be an agent anywhere along the line, in the state of Indiana or Illinois, who could be reached by the shortest line from Richmond station to that place. If not the nearest agent, so ascertained, what agent is meant? Was it the station agent at Louisville, Ky., or at Chicago? There is nothing in the contract from which it can be so determined. And if the provision was held reasonable and valid, and the shipper, before removing the stock, or mingling it with other stock, had notified either of these agents, no reason is perceived why the defendant could not have successfully interposed the objection that other station agents along the line were nearer Richmond station; and so the contention, if made, that the contract is susceptible of such meaning, is answered by the fact that the very contention itself only adds to the uncertainty and indefiniteness of the provision.

The evidence also tends to show that the full amount of damages sustained could only be ascertained after a reasonable time and opportunity had been given the owner of the animals to care for and restore them to a healthy condition. We do not hold the condition in

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and of itself unreasonable, nor that it would not be enforceable as a condition precedent to the plaintiff's right to bring his action, when applied to a shipment by a carrier over its own line, the place of delivery being upon such line; but we do hold that, as applied to the facts in this case, it is so unreasonable and impracticable of performance as to render it void. It would seem that the apparent conflict between decisions bearing on the question may be reconciled upon the just construction that, when the shipper seeks to avoid such a condition, as applied to a shipment over the carrier's own line, the burden is upon him to prove such facts and circumstances as render compliance with its terms impracticable or unreasonable; but that, when the carrier seeks to apply it to a shipment terminating on a connecting line, it must show that it had an officer or station agent at or near the place of delivery, upon whom the required notice could have been served, and who could, by reasonable diligence on the part of the consignee, have been ascertained and found. We see nothing in the facts of the case to authorize a recovery from the defendant for damages sustained upon connecting lines, but the effect of the judgment of the trial court sustaining the validity of the condition not only relieved it from that liability, but also from the recovery for damages claimed to have resulted on its own line. We think the circuit court erred in sustaining the motion, and its judgment, and that of the appellate court, will accordingly be reversed, and the cause remanded, with directions to proceed in conformity with the views herein expressed. Reversed and remanded.

Kansas, &c., Ry. Co. v. Ayers.

KANSAS & A. V. RY. Co. *et al.*

v.

AYERS.

(Supreme Court of Arkansas, Jan. 2, 1897.)

Carriage of Stock—Reasonableness of Contract—Question for Court—Question for Jury.—The reasonableness of a contract is a question for the court where the facts are not disputed and are fully presented in the evidence; but, where there is dispute about the facts the reasonableness of the contract is a question of fact for the jury.

Injury to Stock in Transportation—Damages—Notice of Claim—Reasonableness.*—A contract of a railway company for the carriage of stock provided that the shipper should give notice in writing of claim for damages for injury or loss to such stock to an agent of the defendant one day after the delivery of the stock at the destination and before the removal of the stock or mingling it with other stock, and that such notice was a condition precedent to the recovery of damages for injury or loss. *Held*, that such provision was reasonable.

Claim for Damages to Stock in Transportation.—Where a contract between a railway company and a shipper of live stock requires as a condition precedent to any damages for loss or injury to such stock, that notice shall be given in writing to the agent of such company of claim for damages before the stock is removed or mingled with other stock, such provision does not refer to cattle that are dead in the car before the stock is removed.

Injury to Stock in Transportation—Negligence.—The agent of a railway company induced a shipper to place his cattle in cars, in expectation of a train that would take them at 10.42 a. m., but they were not taken until 5.30 p. m., the railway company having failed to run the former train that day for want of freight for transportation on that day, and not having notified the shipper of the change. *Held*, that the railway company was guilty of negligence.

APPEAL from Sebastian county circuit court. *Reversed.*

To reverse a judgment recovered by the appellee for \$250, against the appellants, on account of damages claimed to have been sustained by the appellee, in injury done to his cattle shipped over appellants' railway, this appeal was taken. In consid-

Case Stated.

*See notes at end of case.

eration of a reduced rate, the shipper (the appellee) entered into a contract with the carrier (the railway company) as follows: "First. That the live stock covered by this contract is not to be transported within any specified time, nor delivered at any particular hour, nor in season for any particular market. * * * Fifth. That, as a condition precedent to any damages or any loss or injury to live stock covered by this contract, the second party will give notice, in writing, of the claim therefor to some general office, or to the nearest station agent of the first party, or to the agent at destination, etc., to some general officer of the delivering line, before such stock is removed from the point of shipment, or from the place of destination, and before such stock is mingled with other stock, such written notice to be served within one day after the delivery of the stock at destination, to the end that such claim may be fully and fairly investigated; and that a failure to comply with the provisions of this clause shall be a bar to the recovery of any and all such claims." It did not appear in the testimony that the notice as required by the above clause was given. The proof shows there was an agent at the depot or station where the cattle were delivered, and that he saw the cattle, and knew some of them were dead, and that they were in bad shape generally; but it does not show that he knew or was informed that any claim would be made for damages. The cattle were shipped at Muldrow, for Lenapah, in the Indian Territory. The contract was made with the agent at Ft. Smith, who informed the appellee (the plaintiff below) that the train which would carry his stock would leave Muldrow at 10:42 a. m. The appellee loaded his cattle at 9:45 a. m. on two cars furnished by the company for that purpose. No train stopped for his two cars of stock until 5:30 p. m., which train left Muldrow at 5:30 p. m., and arrived at Lenapah at 5:30 a. m., where he unloaded the stock. There were four dead cattle in the cars, and a number of them down, and the balance in bad condition, when they arrived. The contention of the appellee is that

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the delay caused by the non-arrival of the train that was to take his cattle, at 10:42 a. m., till 5:30 p. m., caused the injury to his cattle, as thereby they were on the cars some seven hours longer than they would have been had they been taken at 10:42 a. m. It appeared that the running of the train that was to take appellee's cattle at 10:42 a. m. was abandoned by the railway company, as they did not have freight sufficient to justify running it that day; but the appellee was not notified of that, and hence loaded his cattle on the cars for the train at that hour, and all the time afterwards expected the train, until one came, as stated, at 5:30 p. m. It is also stated by the counsel for the appellee that said contract in regard to notice was unreasonable.

Dodge & Johnson, for appellants.

Grace & Forrester, for appellee.

HUGHES, J. (after stating the facts). Where the facts are undisputed, the reasonableness of such a contract is a question of law for the court; but

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Reasonableness
of Contract.

where there is dispute about the facts, the reasonableness of the contract is a question of fact for the jury. In this case we think the contract was correctly held to be a reasonable one. *Railroad Co. v. Garrett* (Tex. Civ. App.) 24 S. W. Rep. 354; *Railway Co. v. Childers* (Tex. Civ. App.) 21 S. W. Rep. 77; *Railway Co. v. Adams*, 78 Tex. 374; *Railway Co. v. Barber* (Tex. Civ. App.) 30 S. W. Rep. 500; *Case v. Railway Co.*, 11 Ind. App. 517. As we understand, there is no dispute about the facts, and

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of Claim.

that all the facts and circumstances are fully presented in the evidence, and that by them it is shown that the contract is a reasonable one. It is true that one day (the time limited by the contract within which the notice was required to be given by the appellee of his intention to claim damages) was short; yet, when we consider the circumstances, it appears that it was sufficient. The appellee was obliged, by it, to give notice of his intention to

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claim damages, but not to specify the amount of damages he intended to claim, but only to make known to the company his intention to claim damages for the injury done the cattle before they were removed and mingled with other cattle, that the railway company might have a fair opportunity to examine them. The agent of the company was at the station, and the appellee saw him, and talked to him about the injury his cattle had suffered; and it would have required but a few minutes to have given the notice required by the contract of his intention to claim damages. But he moved the cattle out to a ranch without having given this notice.

Assuming that the burden was upon the railway company to prove, as matter of fact, that the contract was reasonable, we cannot understand how other proof can be required, when the evidence in the case shows all the facts, and from them it appears that the contract was reasonable, and the facts are undisputed. In fact, it seems that the reasonableness of the contract was not made a question by the appellee, but that he thought he had to give the notice to the agent at Ft. Smith, where he entered into the contract. It is true that it is held that the burden to prove the reasonableness of a contract of this kind is upon the party relying upon it, and we agree that, where there is a dispute as to the facts, the reasonableness of such a contract is a question for the jury; but, where there is no dispute as to the facts (as we understand was the case here), the reasonableness of the contract is a question of law for the court. Where there is a question as to the reasonableness of the contract, and the facts and circumstances all appear in the testimony, and there is no conflict in it, the court is authorized to determine the question. The cattle that were

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dead in the car before the stock was removed and mingled with other cattle are not within this provision of the contract as to notice. The object in requiring the notice by the shipper of his intention to claim damages to be given before the cattle were removed, and mingled with other cattle, was to afford the railway com-

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pany a fair opportunity to examine the cattle before they were removed, and mingled with other cattle. As to those that were dead, the company had all the opportunity it could have had to examine them. We think as to those there is some evidence to support the charge of negligence upon the part of the railway company, which occasioned their loss, as it may be a fair inference from the testimony that the agent of the railway company induced the appellee to load his cattle on to the cars at Muldrow, in expectation of a train that would take them at 10:42 a. m., whereas the train that did take them did not reach Muldrow until 5:30 p. m. of the same day, on account of the fact that the railroad company had declined to run that train that day because not enough freight was offered for transportation that day to warrant the company in running it, as it thought, but of which the appellee was not in any way notified. For the error in giving judgment for the damage to all the cattle claimed to have been injured, the judgment is reversed, and the cause is remanded for a new trial.

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Transportation—
Negligence.**

BATTLE, J., dissents.

NOTES.

STIPULATION REQUIRING NOTICE TO BE GIVEN BEFORE REMOVAL OF STOCK.

1. Validity in General.

A common provision in a contract for the carriage of live stock, is, that the shipper, as a condition precedent to a recovery of damages for injury to such stock, will give notice in writing of his claim to some officer of the carrier, or its nearest station agent, before the stock is removed from the place of delivery and before it is mingled with other stock. Such condition has in general been held valid and no recovery can be had unless it is complied with. *Gogin v. Kansas, etc., R. Co.*, 12 Kan. 416; *Wichita, etc., R. Co. v. Koch*, 47 Kan. 853; *Rice v. Kansas, etc., R. Co.*, 63 Mo. 314, 20 Am. Ry. Rep. 424; *Sprague v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 684, 34 Kan. 347; *Selby v. Wilmington, etc., R. Co.*, 113 N. Car. 588, 61 Am. & Eng. R. Cas. 337, note (*Distinguishing Capehart v. Seaboard, etc., R. Co.*, 81 N. Car. 438.) See also *St. Louis, etc., R. Co. v. Cleary*, 77 Mo. 634, 16 Am. & Eng. R. Cas.

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122; *Moore v. Great Northern, etc., R. Co.*, L. R. 10 Ir. 95; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; 26 Am. & Eng. R. Cas. 268; *Dawson v. St. Louis, etc., R. Co.*, 76 Mo. 514.

In *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 55 Am. & Eng. R. Cas. 376, it was held that a common carrier of live stock could not limit his common-law liability by a stipulation for such a notice unless the special contract is freely and fairly made, and the carrier cannot exact as a condition precedent for carrying the stock of goods that the shipper shall sign such contract. If the carrier has two rates, one for carrying goods with such a stipulation, and one for carrying goods without the stipulation, the shipper must have freedom of choice in making his selection.

Illinois.—In *Coles v. Louisville, etc., R. Co.*, 41 Ill. App. 608, it was held that a condition that notice should be given to some officer, or the nearest station agent of the company originally receiving the stock for carriage was, in a case where the nearest agent was one hundred miles from the place of destination, unreasonable and void, and see the case preceding the original case for the Illinois doctrine. *Compare Black v. Wabash, etc., R. Co.*, 111 Ill. 351, 25 Am. & Eng. R. Cas. 388.

Kentucky.—In *Ohio, etc., R. Co. v. Taber*, (Ky.) 32 S. W. Rep. 168, it was held that a provision in a contract for carriage of cattle that no recovery for injury thereto should be had unless written notice was given the carrier before the unloading of the cattle, violated the constitution of Kentucky, § 196, which provides that no common carrier shall be permitted to contract for the relief from its common-law liability. *Compare Owen v. Louisville, etc., R. Co.*, 87 Ky. 626, 35 Am. & Eng. R. Cas. 687.

Texas.—In *Gulf, etc., R. Co. v. Yates*, (Tex. Civ. App., 1895,) 32 S. W. Rep. 355, it was held that a clause which required notice of injuries to be declared before the stock was removed as a condition precedent to recovery, was violative of the act of March 4th, 1891. See also *Gulf, etc., R. Co. v. Vaughn*, (Tex. App., 1890,) 16 S. W. Rep. 775. *Compare Gulf, etc., R. Co. v. Stanley*, (Tex., 1895,) 33 S. W. Rep. 109; *Texas, etc., R. Co. v. Scrivener*, 2 Tex. App. Cir. Cas. § 328.

Tennessee.—Such a contract is void for uncertainty as to the person to whom the notice should be given, and because it is an attempt to protect the carrier from liability from losses caused by its own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to recover. *Smith v. Louisville, etc., R. Co.*, 86 Tenn. 198. *Followed in Louisville, etc., R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320.

2. Damage not Discoverable at the Time.

Where it appears that the damage, or its extent could not possibly be discovered for some time after the arrival of the stock at its destination, the stipulation will not defeat the owner's right of action. *Louisville, etc., R. Co. v. State*, 6 Ind. App. 183; *Houston, etc. R. Co. v. Davis*, (Tex. Civ. App. 1895) 31 S. W. Rep. 308; *Gulf, etc., Co. v. Stanley*, (Tex. 1895) 33 S. W. Rep. 110; *Oxley v. St. Louis, etc., R. Co.*, 65 Mo. 629; *Engeseth v. Great Northern R. Co.*, (Minn. 1896) 68 N. W. Rep. 4; *Ormsby v. Union Pac. R. Co.*, 2 McCrary (U. S.) 48. Thus the lim-

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itation does not apply where horses were burned and plaintiff was unable to ascertain definitely the amount of his loss. *Houston, etc., R. Co. v. Williams*, (Tex. Civ. App. 1895) 31 S. W. Rep. 556.

3. Removal by Carrier's Agent.

Of course if the stock is removed by the agent of the carrier, and not by the owner, there is no violation of the stipulation. *Baker v. Missouri Pac. R. Co.*, 34 Mo. App. 98.

4. Cattle Shipped to a Distant Point—Connecting Lines—No Agent at Destination.

Where cattle are shipped to a distant point unaccompanied by the shipper, the shipper must forward the contract to the consignee so that he may comply with it. *Galveston, etc., R. Co. v. Harman*, 2 Tex. App. Civ. Cas. § 136.

Connecting Lines.—The fact that the point of destination is a great distance from the initial line, does not render the stipulation unreasonable, since the agents of the connecting line at the point of destination are to be regarded as the agents of the initial line for the purpose of receiving notice and acting upon it. *Wichita, etc., R. Co. v. Koch*, 47 Kan. 753. But see *Ayers*, the principal case.

No Agent at Destination.—Where there is no agent of carrier at place of destination, or the agent cannot be found, the stipulation is invalid as being unreasonable. *Carpenter v. Eastern R. Co.*, (Minn. 1897) 69 N. W. Rep. 720; *Engesether v. Great Northern R. Co.*, (Minn. 1896) 68 N. W. Rep. 4.

That the carrier must show that it had an officer or agent near the place where notice was to be given, see *Good v. Galveston, etc., R. Co.*, 40 Am. & Eng. R. Cas. 98; *St. Louis, etc., v. Turner*, 1 Tex. Civ. App. 625.

Where a railroad company sets up, in an action against it for failing to deliver cattle within a reasonable time, a special contract by which it was agreed that as a condition precedent to the plaintiff's right to recover damages for loss or injury the shipper should give notice in writing of his claim to the officers of the company or to its nearest station agent before the cattle were removed from the place of destination or mingled with other stock, and it appears that the defendant's line of railway does not extend to the point of destination, and that both parties understood that the cattle were to pass on a connecting road, the provision is unreasonable and invalid, and will not be enforced. *Missouri Pac. R. Co. v. Harris*, 28 Am. & Eng. R. Cas. 107, 67 Tex. 166. *Quoting Southern Express Co. v. Caperton*, 44 Ala. 103. *Reviewing Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *U. S. Express Co. v. Harris*, 51 Ind. 127; *Westcott v. Fargo*, 61 N. Y. 542; *Adams Express Co. v. Reagan*, 29 Ind. 21. *Quoted in Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302.

5. Waiver.

The plaintiff, in an action to recover for an injury to stock shipped over the defendant company's line, presented a claim for damages to his stock to the general freight agent of the company and, by the latter's direction, left the claim with him. The agent afterward wrote the plaintiff rejecting one portion of his

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claim, but offering to pay the remainder. It was held that there was sufficient evidence of a waiver of the stipulation requiring notice, to entitle the plaintiff to go to the jury on the question as to whether or not the defendant company had waived the provision requiring the claim to be presented before the removal of the stock from the station. The fact that the waiver did not occur until after the time for presenting the claim had expired was immaterial, it appearing that the company's agent treated the case as if the company's liability still existed, and directed the plaintiff to go to the trouble and expense of filing his statement and claim for damages. *Hudson v. Northern Pac. R. Co.*, 92 Iowa 231; 61 Am. & Eng. R. Cas. 329, citing *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Hollis v. State Ins. Co.*, 65 Iowa 454; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *Hill v. Western Union Tel. Co.*, 85 Ga. 425; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; 21 Am. & Eng. Corp. Cas. 88, 25 Am. & Eng. Corp. Cas. 519; *Roly v. American Cent. Ins. Co.*, 120 N. Y. 510; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. Car. 472.

In another case, the shipper, having sustained a loss, wrote a letter to the defendant company's claim agent, who received it within the prescribed time, but no affidavit was attached to the letter as the contract required. Thereafter, in response to a letter of inquiry, the shipper received an answer from the agent to the effect that the claim had been left to the legal department of the company for an opinion as to the latter's liability. In an action by the shipper, it was held that the jury was justified in believing that the company received the claim without objection or pointing out its defects, and afterwards treated it as pending for adjustment upon its merits, and that consequently there was a waiver of other or further notice of the claim for the loss. *Wabash R. Co. v. Brown*, 152 Ill. 484.

Appellants contracted with appellee to carry a horse from Shelbyville, Ky., to the fair grounds, near Chicago, the contract containing the stipulation as to notice of claim for damages above referred to. In removing the horse from the cars at the place of destination he was injured. The fact of the injury and of appellant's claim for damages was not only known to the officers and agents of the company, but an examination of the horse was made by a surgeon, at the instance of the company. In his crippled condition the horse was brought back from Chicago on the same line of road and delivered at the same depot from which he had been originally shipped. *Held*, that the removal, although at the instance of the owner, must be regarded as by the consent of both parties and as a waiver of the notice required by the contract. *Owen v. Louisville & N. R. Co.*, 35 Am. & Eng. R. Cas. 687, 87 Ky. 626.

6. Burden of Proof.

In *Texas* as a corollary of the rule that the answer must set up the reasonableness of the limitation, it has been held that the burden of proof is upon the carrier to show that the limitation was reasonable in the particular case at bar. *Fort Worth, etc., R. Co. v. Great-house*, 82 Tex. 104, 49 Am. & Eng. R. Cas. 165. See, also, *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 35 Am. & Eng. R. Cas. 666; *Missouri Pac., etc., R. Co. v. Harris*, 67 Tex. 167, 28 Am. & Eng. R. Cas. 107.

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7. Pleading.

In *Texas* it has been held that the answer of the carrier which pleads a stipulation as a defense must allege all the facts necessary to render such a stipulation reasonable. *Fort Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 49 Am. & Eng. R. Cas. 165; *Galveston, etc., R. Co. v. Thompson* (Tex. Cir. App. 1893), 23 S. W. Rep. 930; *Galveston, etc., R. Co. v. Williams* (Tex. Cir. App. 1894), 25 S. W. Rep. 1019.

In *Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17; 49 Am. & Eng. R. Cas. 168, where a somewhat similar stipulation was under review, there was no effort on the part of the shipper to prove that the contract had not been executed. No plea of *non est factum* had been filed. It was held that a replication which averred that the plaintiff did not agree to the stipulation, and that the stipulation was void as being against public policy was bad for duplicity and should be stricken out. The court further held that the carrier need not show that it tendered the shipper any other contract than the one containing the stipulation. It was sufficient to show a readiness to do so upon the shipper's demand.

8. Substantial Compliance.

The stipulation, when so framed as to be valid, is to be given a reasonable circulation. A substantial compliance on the part of the shipper is all that is to be required, having in view the object and purpose of the requirement of notice.

The object of such a provision in a contract for the shipment of cattle is to give the company and the plaintiff time to inspect the stock before they are mixed with others, or slaughtered, so as to ascertain their true condition; such a provision is substantially complied with where stock arrived at the place of destination in the night, and the owner asserted a claim for damages to the company's yardmaster, notifying him that he would not receive the cattle unless under protest, and the yardmaster assured the owner, without making any objection to the demand as not being in writing, that it was not necessary to go to the company's office that night, and advised the owner, on account of the rain and the condition of the stock-yards, to remove the cattle at once to his own place. So far as the stipulation was not complied with in such a case, it was waived, and a written notice given after the removal of the stock, coupled with the verbal notice, was enough. *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314; 20 Am. Ry. Rep. 424. Compare *Missouri Pac. R. Co. v. Scott*, 2 Tex. App. Civ. Cas. § 324, where it was held that a mere verbal notice to the superintendent of a stock-yard and to the conductor of the train was not a sufficient compliance with the condition requiring notice; and that the fact of the shipper's being informed by these parties that a member of the company would come and settle with him would not amount to a waiver on the part of the company of the written notice expressly stipulated for.

In the case of *Houston, etc., R. Co. v. Hester*, 2 Tex. Unrep. Cas. 296, the cattle reached their destination at night when it was dark and raining, and were put off where the company had no yards to put them in. They scattered and it was several days before they could be collected together. Some of them were never recovered. It was held that under the circumstances a mere verbal notice, given

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on the night of the arrival of the stock and a written notice given as soon as the cattle were recovered and the extent of the loss and injury clearly ascertained, was a reasonable compliance with the stipulation, although not conforming with the technical letter of it. See, also, for a similar case, *Gulf, etc., R. Co. v. York*, 2 Tex. App. Civ. Cas. § 813.

The stipulation is not to be construed unreasonably against the shipper. Although it may require expressly that notice of injury shall be given before the removal of the stock, yet the shipper is entitled to a reasonable time after their removal to present a claim for losses which could not have been discovered sooner. What is such reasonable time is a question for the jury. *Western R. Co. v. Harwell*, 97 Ala. 341, *affirming* 91 Ala. 340; 45 Am. & Eng. R. Cas. 358. See also *Ormsby v. Union Pac. R. Co.*, 4 Fed. Rep. 706; 2 McCrary (U. S.) 48, *affirming* 4 Fed. Rep. 170.

What is a Violation of Stipulation.—In *Chicago, etc., R. Co. v. Abels*, 60 Miss. 1017, the plaintiff shipped certain stock to D. by the defendant company's line, under a special contract providing, *inter alia*, that, as a condition precedent to the right to recover anything in the event of a loss, the plaintiff should give notice, in writing, to the company's agent of his claim for damages "before said stock is removed from the place of destination or mingled with other stock." On the passage a mule was injured. It was taken off the cars at D. in the presence of the company's agent, who saw its injured condition. The plaintiff refused to receive the mule and it was allowed to run on the common at D. In an action by the plaintiff to recover the value of the mule, it was held that the action could be maintained; that the stipulation was valid but that there had been no violation of it by the shipper, since there had been no removal of the mule from the place of destination, within the meaning of the stipulation, and no mingling of it with other stock.

Where it appears that the condition of the stock was made known to the company's agent at the destination and the agent then consented to the removal of the stock from the cars, and afterwards had abundant opportunity to examine and inspect them before they were mingled with other stock, and a notice of claim for damages is given four days later by the shipper, there is a sufficient compliance with the stipulation. A substantial compliance is all that is required. *Atchison, etc., R. Co. v. Temple*, 47 Kan. 7.

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SPRAGUE

v.

NEW YORK & N. E. R. Co.

(Supreme Court of Errors of Connecticut, Dec. 1, 1896.)

Railway Companies—Provision for Running of Trains—Question of Fact.—In an action against a railway company to recover for the death of an employee killed through the collision of two of its trains, it is a question of fact for the trial court, not reviewable on appeal, whether emergencies arose, which could not be foreseen and provided for, calling for prompt action on the part of such company, and what action was called for, in view of such emergencies, to secure the safe running of trains, in addition to the means ordinarily used.

Action for Tort—Pleading.—The admission arising from a demurrer overruled or a default is not evidence of the liability for substantial damages of the defendant in an action for tort, or that such damages were suffered, or that the defendant was liable for them if they were suffered, but when the plaintiff in such an action, standing upon default or upon demurrer overruled, has proved substantial damages, resulting to him from the injury complained of, such proof is *prima facie* sufficient to indicate the defendant's liability for such injury and damage to the extent proved.

APPEAL from Hartford county superior court. *No Error.*

Edward D. Robbins and *George A. Kellogg*, for appellant.

Charles G. Root, for appellee.

FENN, J. This is an action by an administratrix to recover damages for an injury which caused the death of the intestate. The amended complaint alleged that

the intestate, Gilbert A. Sprague, was on September 24, 1891, a brakeman in the employ of the defendant, and was then, lawfully and with due care, and in the regular course of his employment, proceeding on a train operated by the defendant, and running from Danbury towards Hawleyville; that on said day, while said Sprague was so proceeding on said

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train, the defendant carelessly and negligently caused and allowed another train to proceed and run from Hawleyville towards Danbury on the same track on which the said Sprague and the train whereon he was were then proceeding and running, and in a direction opposite to that in which said last-mentioned train was running; that a collision occurred, in which said Sprague was crushed and killed; that the said train running from Hawleyville to Danbury, which collided with the train on which said Sprague was, was in charge of one Conrad as conductor, with William Heeney as its engineer,—both employed in said capacities by the defendant; that both were incompetent to act in their respective capacities, which was well known to the defendant; that the negligence of the defendant consisted in carelessly and negligently causing and allowing said two trains to collide in the manner stated, and in employing said Conrad as conductor and said Heeney as engineer on said colliding train. The court, upon a hearing after demurrer overruled, assessed full damages, and rendered judgment accordingly.

From the detailed and careful finding of the trial court, it appears that the injury complained of occurred in the manner and under the circumstances stated in the complaint. The engines of two railroad trains going in different directions on the defendant's single track railroad collided a little before 8 p. m., September 24, 1891, at a point between Hawleyville and Danbury, near Hobart's siding, about one mile west from Hawleyville and five miles east from Danbury. The intestate was a brakeman on the eastbound train, known as "No. 700,"—a first-class freight train. This train was scheduled on the time-card in force at that time to leave Danbury, going east, at 7:10 p. m., but left Danbury on that day at about 7:40 p. m., being about 30 minutes behind time. The same train was scheduled to leave Hobart at 7:40 p. m., to arrive at Hawleyville at 7:45 p. m., and to leave Hawleyville at 8:40 p. m. The train which collided with train No. 700 was known as "No. 67," and was a second-class freight train, on

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its way west from Hartford, scheduled on the time-card to leave Hawleyville at 3:55 p. m. On this day it left Hawleyville at about 7:30 p. m., being nearly four hours behind time. Train No. 67 had been delayed by waiting at stations for the passing of trains, both regular and irregular, which blocked the road. Some of the waiting at stations was upon special orders or messages from train dispatchers, issued and signed in the name of the superintendent. Train orders or messages from train dispatchers were frequent, and some of them directed the movements of this train. Some of the delays at stations appear to have been made by the conductor and the engineer in accordance with what they supposed were the rules of the company. Operators on the line kept dispatchers informed of the situation of trains. At Hawleyville, messages from dispatchers were received ; but it does not appear what they were, and it is not found that there was any special order directing when the train should leave Hawleyville. Train No. 28, a first-class passenger train, was also scheduled on the time-card to leave Danbury, going east, at 7:10 p. m., the same time at which No. 700 was scheduled to leave, but was behind time, and left at about 7:25 p. m. A message was sent by a train dispatcher to the conductor of train No. 700, at Danbury, substantially as follows : "If no room at Danbury, go to Hobart's, ahead of train 28." There was room, however, and train No. 700 waited at Danbury till train No. 28 had left. Train No. 67 left Hawleyville upon the arrival there of train No. 28. Whether the fact of the sending of the above message to the conductor of train No. 700 was communicated to the conductor of train No. 67 did not appear from the testimony.

The time-table then in force for the government of employees upon said portion of the defendant's railroad was, as appeared on its face, in each upper corner thereof, "Time-table No. 48, to take effect Sunday, September 20th, 1891, at 12 o'clock noon, superseding time-table No. 47, dated May 10th, 1891." This time-table, No. 48, was made a part of the finding, and it

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may be said, in brief, that, as claimed by the defendant, it appears "so arranged, of such a nature, as to leave as little need as possible for any interference by the train dispatchers." No fault in that respect is, or, we think, could be, found. On the face of this time-card in force on September 24th was printed, in large, clear type, near the top of the sheet, the following: "For general instruction, see other side." On the other side of this time-card were plainly printed the following rules: "Rule 5. Trains on the road are in charge of the conductor, but engineers are equally responsible for the observance of running directions." "Rule 26. No train will proceed from one station towards another station, where it expects to meet a train having the right of track, unless it has ample time to arrive there by running at its usual speed. Rule 27. Regular first-class trains have the right to track over all other trains." "Rule 30. Second-class trains must be kept ten minutes off the time of regular first-class trains." "Rule 35. Whenever time-table time is mentioned in these rules, it means leaving time, and all trains will be considered due at the next point, where they are timed, immediately after leaving time at the preceding station. Rule 36. Trains which are provided for by schedule must not move otherwise than in accordance with schedule rules, except upon a written or telegraphic order signed by the division superintendent, or person authorized by him to sign such orders. Trains which have not schedule rights must not occupy the main track on the time of trains having schedule rights, without a like order, excepting within the yard limits, and in accordance with the rules provided for their government."

E. B. Conrad was employed by defendant as the conductor, and William L. Heeney as the engineer, of train No. 67. At the time of leaving Hawleyville, both the conductor and engineer of train No. 67 were on the engine. The engineer, Heeney, asked the conductor, Conrad, to look at the time-card to see what time train No. 700 left Danbury. Conrad looked at a time-card,

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and answered that there was time enough. Heeney did not look at his time-card. Conrad had never taken charge of any train on the defendant's road till he took charge of train No. 67, on the day of the collision, and that was the first service he had ever performed for the defendant. Division Superintendent R. B. Williams employed Conrad as conductor about 10 days prior to the day of the collision—it being his duty, as superintendent, to employ conductors and engineers on his division—under the following circumstances: About the 1st of September, the month of the collision, Williams wrote several letters to different superintendents, asking them to recommend to him some first-class single-track freight conductors. He received a letter from John Babcock, train master of the New York, Pennsylvania & Ohio Railroad, recommending Conrad as a first-class conductor. Conrad came to Williams also with a letter from Mr. Charles Howard, recommending him as a first-class conductor on a road in Ohio which Howard had operated. Williams gave Conrad some general examination, and gave him a letter to Train Master Russ for further examination on time-card and rules. Russ gave him some kind of an examination, but of what character is not stated. The time-card at that time in force was one issued in May—not the one in force on September 24th. Conrad was given 10 days to learn the road, and was then ordered to run train No. 67 on September 24th. Conrad had not in fact learned the road when he reported for duty, and Engineer Heeney had to attend to certain duties of the conductor as well as his own. He did not know at what time train No. 700 was due to leave Danbury or Hobart. He was unfamiliar with the time-card (if, indeed, he had the proper one), with the application of the rules of the company (even if he had made any study of them or knew anything about them), and with the defendant's system of management of trains on that day, which was carried on partly by special orders, partly by messages, and partly upon the knowledge and judgment of conductors. He was entirely without

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any experience in the position he was in on the defendant's road, and was incompetent to discharge its duties. Engineer Heeney had been in the employ of the defendant a year as engineer, and for several years earlier as a fireman. Under the system of the company, its trains had no regular engineers; an engineer being assigned one day for one train, and on another day for another train. Heeney had not run train No. 67 for a month before the day of the collision, and had run the train but a few times altogether. He did not know the time at which train No. 700 was due to leave Danbury, and supposed that Conrad's statement was correct. He followed the directions of the conductor whom the defendant had placed in charge of the train. He was a competent engineer. There was no negligence on his part amounting to a want of ordinary care.

Upon these facts the findings of the court as to the negligence of the defendant were: "The defendant company knew, or ought to have known, that he [Conrad] was thus incompetent. The superintendent and train master did not exercise reasonable care in the examination, instruction, and preparation of Conrad for his duties. The defendant did not, by its superintendent or train master, or by any officer of the company, or by any provision whatever, exercise reasonable care in placing Conrad in charge of train No. 67, in view of the nature of his duties on that day. The superintendent and train dispatchers did not give Conrad special orders or proper messages to guide him in the movement of his train from Hawleyville, and failed to exercise reasonable care in this regard, in view of Conrad's known inexperience, and the condition of business and situation of trains on the road on that day. The defendant was guilty of negligence amounting to a want of reasonable care, in not providing in some way for the special direction of Conrad, under the circumstances disclosed by the evidence. The collision was due to the incompetency of Conductor Conrad, and to the negligence and want of reasonable care of the de-

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fendant, its superintendent, train master, and dispatchers, as above stated."

The nine reasons of appeal assigned by the defendant present, in effect, two questions, and two only, for our consideration: First. Can this court, upon the facts stated, review the findings or conclusions of the trial court above recited, in reference to negligence, and find error therein? Second. Did the court err, in a hearing in damages upon demurrer overruled, in using the admission of the demurrer as substantive evidence against the defendant,—as evidence which must be overcome in order to prevent the plaintiff from recovering full damages?

In reference to the first question: There is and can be no dispute as to the law that a master is bound to exercise reasonable care to provide for his servants a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and fit and competent persons as his co-laborers. For negligence in the performance of his duty in this respect, the master is liable. Equally so where the injury is produced by the combined negligence of himself and a fellow servant of the injured employee. There is and can be no dispute, also, that this was the rule or standard which the court recognized and sought to apply. The question was, did the master, in these respects, exercise, as he was bound to do, such reasonable care, under the circumstances stated? These circumstances were exceptional, peculiar, and such apparently as to call for the application of the often-repeated and familiar utterance of this court, "that reasonable care is care proportioned to the danger to be guarded against, and, in dangerous situations, means great care." We think the record presents an instance of "inferences or conclusions of the court below, based upon the special circumstances of the case, where the only standard of duty is the indefinite and varying one of the conduct of a reasonable and prudent man under like circumstances,—where, therefore, not only the extent of performance, but also the measure of duty, must be

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ascertained as facts." *Dundon v. Railroad Co.*, 67 Conn. 266, 269; *Bunnell v. Bridge Co.*, 66 Conn. 24.

But the defendant says in its brief: "It is evident that it would be absurd to leave to a petit jury the question whether a system of railroad management, in order to be a reasonable and proper system, should permit or provide for special telegraphic orders from train dispatchers to warn trainmen of facts apparent on the face of the printed time-card." Whether this be true or not scarcely seems to be a relevant inquiry in the present action. But, if it be, the homely adage that "circumstances alter cases," will apply. More than this, the defendant cites no authority elsewhere in support of the proposition, and certainly it has no sanction from any utterance of this court. On the contrary, in *Darriگان v. Railroad Co.*, 52 Conn. 285, 306, this court said: "The diligence required will be the greater as the dangers and hazards increase. * * * It is the duty of a railroad corporation to prepare a time-table and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise, which no system of rules can anticipate and provide for, in which the company must act, and act promptly and efficiently." Whether the emergencies above spoken of have arisen, and what action is called for in view of such emergencies, is manifestly a question of fact for the trial court, be that tribunal judge or jury. That, of course, makes no difference. We have repeatedly so held in effect. *Fritts v. Railroad Co.*, 62 Conn. 503, 508; *Donovan v. Railroad Co.*, 65 Conn. 201-214; *Dundon v. Railroad Co.*, *supra*; *McAdam v. Electric Co.*, 67 Conn. 445; *Heenan v. Traction Co.*, 67 Conn. 594. The terse language used by this court in the case last cited is applicable and decisive here: "These questions were for the determination of the trial court, and its decision is conclusive. There is nothing in the finding * * *

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to indicate that the trial court imposed * * * a higher degree of duty than the law requires."

Action for Tort—
Pleading. But the defendant, as we have seen, contends that the court below erred in this: that, as shown by the finding, it used the admission of the demurrer as substantive evidence against it. The matters in the finding especially relied upon by the defendant as showing this, are the statements that there was no evidence as to whether the conductor, Conrad, who did not appear at the trial, "got so far as to read anything on the card which he had, or, indeed, whether he was able to read. There is no evidence that the card which Conrad had was the one issued September 20th, or that such card had ever been furnished him, or that he knew of its issue. Conrad is not proved to have been over the road, or any part of it, but once between the time of his employment and his reporting for duty on the 24th of September. He was not placed with any conductor or engineer to learn the road. And it is not proved that he was ever, even for a moment, with any employee on the road, or that he made any effort whatever to learn the road, or to become familiar with the duties of a conductor on the road, or that he was ever informed until the 24th of September, on what train he would be placed." It is said, for the defendant, that it is apparent from this language "that the court considered the defendant's failure to disprove certain possible facts to be equivalent in its effect to an admission of those facts." In this connection, and in support of this claim, the defendant cites certain language of this court from the opinion in the case of *Nolan v. Railroad Co.*, 53 Conn. 461, 475, 25 Am. & Eng. R. Cas. 342. "It will be observed that the court was careful not to find that the plaintiff proved that the defendant was negligent. Evidently, in this state of things, the court regarded the admission by the demurrer as entitling the plaintiff to full damages. In other words, the admission was thrown into the scale as evidence, which, we think, was an erroneous use of it." This language is confessedly *obiter*, for the court im-

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mediately says, "But this is not of any practical importance in this case." We are glad that it was not, for we confess that, standing alone, the language used admits of a construction which is entirely opposed to the recognized practice of many years, and to the thoroughly established rules relating to such matters in this jurisdiction. Perhaps, indeed, the language used is not capable of any other construction. But however this may be, the true rule, as we have held it, has been frequently stated in the Reports, and appears, indeed, in another part of the opinion in the very case to which we have just referred. *Havens v. Railroad Co.*, 28 Conn. 69; *Daily v. Railroad Co.*, 32 Conn. 356; *Lamphear v. Buckingham*, 33 Conn. 237, 250, 251; *Daniels v. Saybrook*, 34 Conn. 377, 381; *Carey v. Day*, 36 Conn. 152, 155; *Batchelder v. Bartholomew*, 44 Conn. 494, 501; *Crane v. Transportation Line*, 48 Conn. 361; *Crogran v. Schiele*, 53 Conn. 186; *Nolan v. Railroad Co.*, *supra*; *Martin v. Railroad Co.*, 62 Conn. 331, 337.

Applying the rule deducible from these decisions to the present case, it appears to us, from a careful reading of the entire finding of the trial court, in connection with those extracts from it which we have quoted under this head, that the position of such court was this: The plaintiff, not content with nominal damages, to which the action in reference to the demurrer entitled her without evidence, went forward with evidence to prove substantial damages. The plaintiff having then rested, the defendant introduced evidence to meet the case which the plaintiff had made. For that purpose it offered evidence to show that it was not negligent, and, therefore, not liable for these substantial damages, but merely for nominal damages, and for these only on account of its admission. The defendant, in the opinion of the trial court, failed to accomplish this purpose, and the case for substantial damages established upon evidence by the plaintiff, not having been overthrown by evidence from the defendant, stood. The defendant appealed, assigning this ruling of the trial court as a

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reason therefor. The court, in its finding upon such appeal,—a most careful and detailed statement, as it appears to us,—has stated the facts that did appear in evidence, and on which the defendant relied in support of its claim. We think that the natural and most reasonable explanation of such parts of the finding as stated what did not appear was to avoid inferences unfair to the plaintiff which might otherwise have arisen, and to give the clearest and most correct possible statement of the case as it was presented upon the trial. Let us illustrate this: In the court below the defendant claimed, as it has also done before us, that the rules which appeared on the face of the time-card in force on September 24th—which rules are quoted at length in the finding—"were easy to be understood by any man who had had experience on a railroad, and were proper rules, entirely sufficient if obeyed, to prevent such an accident as this; that the defendant was under no obligation to send a special telegraphic message to those in charge of a train to advise them of facts which plainly appeared on the face of the time-table; that the defendant's duty in regard to the protection of its servants upon train 700 against their co-servants operating train 67 was fulfilled, so far as the conductor of train 67 was concerned, by the scheduling for him of train 700 on its time-card in the manner proved at the trial." These matters were relied upon as establishing the claim that the defendant was not chargeable with negligence, and, therefore, was not liable for the substantial damages proved. They were shown to reduce such substantial and actual damages back again to the nominal point at which the damages stood before the introduction of the plaintiff's evidence. The fact, then, that there was no evidence that the time-table, with the rules upon it was ever shown to Conrad, or that he knew of its issue, bore upon the sufficiency of such evidence to accomplish such object. It was material, not because it strengthened the plaintiff's case upon rebuttal by any presumption, but because, with-

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out such evidence, the defendant failed to establish its own contention in such a way as to call for any rebuttal of it. The admission arising from a demurrer or a default is in no sense to be regarded as an acknowledgment, or used as evidence, or considered as equivalent to evidence, of liability on the part of a defendant for substantial damages ; nor, indeed, that there were any such damages suffered, or, if so, that they were in any way chargeable to the defendant. What the cases in this jurisdiction have held is, substantially, that when a plaintiff in an action of tort, standing upon default or upon demurrer overruled, has proved actual and substantial damages, resulting to him from the injury complained of, such proof is in the first instance, and *prima facie*, sufficient to indicate that such injury and damage, to the extent proved, is chargeable to the defendant's fault, and that, therefore, the case made out is one which calls upon the defendant to meet it by counter evidence, or submit to judgment for the sum proved. We think the trial court acted with this view of the law, and properly. There is no error. The other judges concurred.

O'Conner v. Scranton Traction Co.

O'CONNER

v.

SCRANTON TRACTION CO.

(Supreme Court of Pennsylvania, March 22, 1897.)

Presumption of Negligence—Rebuttal—Question for Jury.—In an action against a street railway company to recover for personal injuries the question as to whether the presumption of negligence arising from such injury is successfully rebutted or not is for the jury.

APPEAL from Lackawanna county court of common pleas. *Affirmed.*

Horace E. Hand and Everett Warren, for appellant.
Joseph O'Brien and John P. Kelly, for appellee.

PER CURIAM. The principal question raised by this appeal is presented most distinctly by the first assignment of error. The defendant's counsel, by their sixth point, had asked the court to instruct the jury that the presumption of negligence arising from the happening of an injurious accident to the vehicle employed for the carriage of passengers, resulting in injury to a passenger, is successfully rebutted by proof that the track was in good order and repair, the car in perfect repair, and the management and operation careful and skillful. The learned judge did not in so many words affirm or deny the doctrine of the point, but he told the jury that the question as to whether the presumption of negligence had been successfully rebutted or not was for them to determine. This, while not a categorical answer, submitted the question to the jury as one of fact. The question was for the jury (*Sullivan v. Railroad Co.*, 30 Pa. 234); and no injustice was done by the form of the answer. We see nothing in the record to require us to interfere with this judgment, and it accordingly is affirmed.

Baltimore Traction Co. v. Helms.

BALTIMORE TRACTION CO.

v.

HELMS.

(Court of Appeals of Maryland, Jan. 5, 1897.)

Injuries to Persons—Contributory Negligence.*—A person alighted from a street car, passed behind it and started across a parallel track a few feet away without stopping, looking or listening to see if any car was approaching on such parallel track, of which there was an unobstructed view for more than a mile, and was struck and injured by a car approaching in an opposite direction from the one which he had left. *Held*, that he was guilty of such contributory negligence as to prevent a recovery for his injuries.

APPEAL from court of common pleas. *Reversed*.

Argued before McSHERRY, C. J., and BRYAN, ROBERTS, BRISCOE, and FOWLER, JJ.

Eugene H. Harris, Fielder C. Slingluff, and W. Pinkney Whyte, for appellant.

B. Rosenheim and William Colton, for appellee.

FOWLER, J. On the 19th of March, 1895, the plaintiff boarded a car of the Baltimore Traction Company bound east on Fort avenue. On this avenue there is another track of the same company, which is used for its cars going west. The track used by the cars running east is on the south side, and that used by the west-bound cars is on the north side, of Fort avenue. The plaintiff alighted from an east-bound car at or near the corner of Fort avenue and Garrett street, and proceeded at once, in the rear of the car he had just left, to walk north across Fort avenue. He was injured by one of the cars of the defendant company moving west.

*Note—See *Evansville Street R. Co. v. Gentry* (Ind.), 5 Am. & Eng. R. Cas., N. S., 500, and note 506.

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At the conclusion of the testimony of the plaintiff the defendant asked the court below to take the case from the jury, and, its prayer to this effect having been refused, it offered testimony on its own behalf. At the conclusion of the defendant's testimony it renewed its request to have the case taken from the jury. But the court again refused so to do, and hence this appeal. There are some other questions presented, but, inasmuch as we are of opinion that the plaintiff failed to make out a case for the jury, and is, therefore, not entitled to recover, we will not consider them. Assuming, then, the truth of the plaintiff's testimony, as we are bound to do,—this being the legal effect of the defendant's first prayer,—what is the testimony of the plaintiff? When the car in which the plaintiff was riding was approaching Garrett street, he notified the conductor to stop. The car having stopped, he left it; and what subsequently happened was described by him in his examination in chief, his cross-examination, and in his answers to a series of questions put to him by the learned judge below. It seems to us, however, that, according to his own account of this unfortunate occurrence, there is ample evidence to show that he was injured by reason of his own carelessness and reckless disregard of his own safety. In his cross-examination he said: "As I stepped off, I looked down [east] Fort avenue to see if a car was coming in that direction, and I saw none coming, but, unluckily for me, there was one coming, to my sorrow, and I started across the track; and I was just as deliberate as you are now, and, hearing no warning of any approaching car, I was struck. The first thing I noticed was when the motorman holloed 'Look out!' and his voice hadn't done sounding when I was hit." "That if he had stopped when he alighted from the east-bound car, and waited for it to pass until his line of vision would cover the west-bound track, no accident would have happened." The court then asked the following questions, and the plaintiff gave the following answers: "Question. Now, what prevented you, after you passed around the car, from

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looking in time? Answer. Well, what I mean, your honor, is : Before I alighted from the car I looked in the direction of the cars that came towards the west, and I didn't see any approaching car ; so I was just as cool and deliberate as I could be, thinking there was nothing, and I stepped right on the west-bound track, and just as slow as a man could walk, and before I knew it I was struck. Question. What I want to know is this : You passed around the rear of the car ? Answer. Yes, sir. Question. And, when you got around the rear of the car, nothing obstructed your vision up in that direction ? Answer. No, sir. Question. Then, if you could have seen the car, and must have seen it if you looked, why is it, as you say, you looked too late ? Answer. Why, because, your honor, the car was running at such a high rate of speed it got on me before I knew it, or before I could realize it. Question. But you would have seen it if you had looked around ? It is a straight track there ? Answer. Yes, sir ; it is a straight track there from the bridge, and for a mile further on. Question. In your examination in chief you said that, when you alighted from the car, you stopped, looked, and listened. Answer. Yes, sir. Question. Now, when you crossed behind the car, and before you reached the west track, did you, or not, make an effort to look up ? Answer. I had my head turned towards the west-bound track all the time. I was looking for a car to come, but I saw none. * * * Question. What I want to get at is this : The witness said he was walking deliberately. What I want to know is, if that is the case, why, when he got around the car, to where nothing obstructed his vision, he didn't stop, or what prevented him from stopping at once ?" Whereupon the counsel for plaintiff inform the court that the plaintiff "at that time was right on the three-foot space" (referring to the space between the east and west bound tracks). In answer to further questions the plaintiff answered that he could not possibly have stopped on the three-foot space, and that he had his foot inside the

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rail when the car hit him ; that he had just merely stepped over the rail ; and that he heard no bell.

By the well-settled law applicable to the class of cases to which this belongs, it is not enough for the plaintiff to prove the negligence of the defendant, and the injury which followed, but he is bound also to establish, by satisfactory proof, before he can recover, that he was himself free from negligence, and exercised ordinary care to avoid the consequences of the defendant's negligence. The right to recover depends upon two distinct propositions of fact : First, the negligence of the defendant ; and, second, the exercise of due and ordinary care by the plaintiff. And if he failed to prove negligence on the part of the defendant, or if it appear from his own evidence that he was guilty of negligence directly contributing to the injury, he cannot recover. Assuming, then, as we must, from the plaintiff's testimony, that the defendant was guilty of negligence in running its car, in violation of the city ordinance, at the high rate of speed testified to, was the plaintiff guilty of such contributory negligence as will prevent a recovery ? He walked deliberately, from behind a street car, across a track on which he knew cars were running at intervals of a few minutes. It fully appears from his testimony that, if he had looked, he could have seen the car approaching, and that no accident would have happened. If the circumstances are such that one with normal sight and hearing could see and hear them, his duty requires him to use his senses to guard against injury by the negligence of others. *Steever's Case*, 72 Md. 157. And this rule applies generally to every situation in life. In *Price's Case*, 29 Md. 420, ALVEY, C. J., quotes the terse and forcible remark of Lord Ellenborough : "One person being in fault will not dispense with another's using ordinary care for himself." And, therefore, if the plaintiff, by ordinary care, could have avoided the consequences of the alleged negligence of the defendant—and there can be no doubt, from his own testimony, that he could have done so—and failed so to do,

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he would be the author of his own misfortune—and, therefore, no action would lie. *Price's Case, supra*. Whatever may have been the opinion of the plaintiff as to his power to stop and look before crossing the track, the fact is that he did not take this precaution. Nor is there anything in the evidence to show that he, or any man with ordinary powers, could not have both stopped and looked in time to avoid injury. It does not appear, however, that he made any effort to do either, for he was in the center of the track before he saw the car. If a witness who can see testifies that he looked, and did not see an object which, if he had looked, he must have seen, such testimony is unworthy of consideration. And likewise when a witness testifies, as did the plaintiff in this case, that, if he had stopped in the space between the tracks, he could have stood there in safety while the car passed him, it is to no purpose that subsequently he should be willing to stultify himself, and declares that under the circumstances it was impossible for him to stop in time to avoid the injury. Such testimony is so contradictory and inconclusive that it is unworthy of consideration, and should not, therefore, be allowed to go to the jury.

The public and street-railway companies, as we have frequently said, have equal rights to use the streets of a city for purposes of travel; and the obligations of employees of the latter to keep a constant lookout for persons crossing or approaching the tracks must be faithfully performed, not only at the crossings, but along the whole line of such railroad within the city limits, for the reason that persons have the right to cross the streets at any point along the thoroughfare. *Cooke v. Traction Co.*, 80 Md. 551; *Railroad Co. v. Kehoe* (decided at April term, 1896, and not yet officially reported), 35 Atl. Rep. 90; *Railway Co. v. McKewen*, 80 Md. 593. But, while in the exercise of this right of crossing the public street, pedestrians should use their senses to ascertain whether a car is approaching. *Buzby v. Traction Co.*, 126 Pa. St. 559, 42 Am. & Eng. R. Cas. 144, was a case almost pre-

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cisely like the one at bar. The court say in that case : " The plaintiff, a passenger upon a cable car, got out on the north side, where he was in safety. Without waiting for the car to move, or looking to the west, from which direction danger was to be apprehended, he turned sharply around the rear of the car, and started to cross the street. There was room between the tracks for him to stand in safety and see the whole track. Instead of looking, he stepped upon the south track, and was struck and injured by another car going east. He was properly nonsuited upon the ground of contributory negligence." " Due and ordinary care is to be exercised in crossing public streets, as in all other transactions in life. Even upon the sidewalk, specially devoted to foot passengers, a man is bound to look where he is going ; and this duty is still more imperative when he is about to cross the middle of the street, where horses, wagons, and cars have equal rights with himself, and where he is bound to take notice of such other rights, and to use his own with due regard thereto." *Buzby v. Traction Co.*, 126 Pa. St. 559, 42 Am. & Eng. R. Cas. 144. A similar view prevails in Missouri, Michigan, New York, New Jersey, and Louisiana. *Meyer v. Railway Co.*, 6 Mo. App. 27 ; *Kelly v. Hendrie*, 26 Mich. 261 ; *Scott v. Railroad Co.*, 59 Hun (N. Y.) 456 ; *Davenport v. Railroad Co.*, 100 N. Y. 632 ; *Sheets v. Railway Co.*, 54 N. J. L. 518 ; *Railway Co. v. Block*, 55 N. J. L. 606, 56 Am. & Eng. R. Cas. 590 ; *Schulte v. Railroad Co.*, 44 La. Ann. 509. It is properly said in some of the cases that the failure to stop and look before crossing a street railway will not, under all circumstances, *per se*, constitute such contributory negligence as will prevent recovery. *Burbridge v. Railroad Co.*, 36 Mo. App. 670 ; *McClain v. Railroad Co.*, 116 N. Y. 465, 40 Am. & Eng. R. Cas. 254. Nor do we by any means intend, by what we have here said, to lay down the same rule of conduct as is always applicable to the crossing of tracks of steam and street railways. The legal duties and correlative rights in the two cases are

not the same, and what might be negligence in the one case would in the other, under some circumstances, be held to be but the exercise of a legal right. It is not necessary in this case to formulate any general rule as to the degree of care required of persons crossing highways in cities; for, as we have seen, the plaintiff failed to exercise any care whatever, and seeks to avoid the legal effect of his own misconduct by relying upon the negligence of the defendant. But, even if it were desirable to attempt to lay down any general rule, it would be extremely difficult to do so. "The duty devolving upon one using a highway," say the court in *Block's Case*, *supra*, "for passage on foot, varies with circumstances which are infinitely various. It may be one degree when the highway is a quiet country road, and of another degree when it is the crowded street of a great city. It may differ at different hours of the day, with respect to different vehicles, and the different rates of speed at which they are moving, and by reason of different opportunities of observation. It is impossible to classify these variant circumstances, and to lay down a precise rule as to the degree of care required in each case or class of cases. It is enough, however, for the purposes of this case, to say that one who deliberately walks out from behind a street car from which he has alighted, and attempts to cross a public street, without using his powers of observation, and is injured by an approaching car, which injury could have been avoided by the use of the most ordinary care, will not be allowed to recover. Judgment reversed, without a new trial.

San Antonio St. R. Co. v. State *ex rel.* Elmendorf.

SAN ANTONIO ST. R. CO.

v.

STATE *ex rel.* ELMENDORF *et al.*

(Supreme Court of Texas, March 29, 1897.)

Street Railways—Construction and Operation of Line.*—In the absence of a provision in its charter making it obligatory upon it to construct and operate its line on certain streets, a street-railway company, which has constructed and is operating its line in a city under the authority of an ordinance of such city granting it "the privilege" of so doing, cannot be compelled to construct and operate a line on all of the streets for which it was granted such privilege.

ERROR to Fourth supreme judicial district court of civil appeals. *Reversed.*

Houston Bros., for plaintiff in error.

R. B. Minor, A. Lewy, and Clark, Summerlin & Fuller, for defendants in error.

GAINES, C. J. This case arose by a petition filed in the name of the state of Texas upon the relation of Henry Elmendorf and others to compel the plaintiff in error to operate a part of its lines upon which it had ceased to run its cars. Demurrers to the petition were overruled, and exceptions to the answer of respondent were sustained, and thereupon the peremptory writ was awarded as prayed for in the petition. This judgment was affirmed upon appeal, and to the judgment of affirmance this writ of error has been granted.

The first question is did the facts alleged authorize the relief prayed for in the petition? It was alleged that the respondent company was a corporation, chartered by a special act of the legislature passed May 2, 1874, and authorized to operate street railways in the city of San Antonio for the term of 50 years; that it

*See notes at end of case.

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applied to the city council of the city for authority to construct certain lines within the city limits, and that the privilege was granted by an ordinance, which is copied in the petition. So much of it as bears upon the questions presented, reads as follows :

"Section 1. That the privilege be, and is hereby granted to the San Antonio Street-Railway Company to construct and operate a street railway, with all its necessary tracks, side tracks, switches, turnouts, curves, turntables, etc., and that the rights, privileges, and franchises are hereby granted to the said railway company for and during the term of their charter, upon the following additional streets and avenues, to-wit: Beginning at the end of its present tracks on West Commerce street, thence west over and along West Commerce street to Seventeenth street, thence north over and along Seventeenth street to Zavalla street, thence over and along Zavalla street into the property known as 'Lake View,' thence north on West Nineteenth street to Woodbury avenue, thence along Woodbury avenue to West Belknap street, thence along West Belknap street to Highland Park. Also from West Commerce street, at its intersection with Zalzamoras street, south over and along Zalzamoras street to San Fernando street, thence east over and along San Fernando street to South Laredo street, thence north over and along South Laredo street to Dolorosa street. Also upon and over Myrtle street from South Flores street to San Pedro avenue.

"Sec. 2. That said company may use in the construction and maintenance of said road what is known as 'T rail.'

"Sec. 3. That said company is hereby required to observe all existing ordinances of the city of San Antonio not inconsistent with the rights herein granted."

It is not expressly averred that at the time the ordinance was passed the company had already constructed and had in operation a line or lines of street railway in the city : but we think that this is to be inferred from

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section 1, which speaks of the streets over which the privilege to construct and operate was thereby granted as additional streets and avenues." It was further averred that the company has constructed, and for a time had operated, the line from its beginning point to Highland Park, but that, while it had continued to operate that portion of that line nearest the city, it had abandoned the operation of a part. The prayer was for a writ of *mandamus* to compel the respondent to operate that entire line.

It is a well-settled doctrine that a corporation may be compelled by the writ of *mandamus* to perform a duty imposed by statute. The duty need not be express; it may be implied. Clearly, when it appears by fair implication from the terms of its charter, it is as imperative as if the obligation were expressed. But as to corporations *quasi* public in character—such, for example, as those chartered for the carriage of passengers and freight—there are decisions which hold that they owe certain duties to the public which they may be compelled to perform, although not enjoined by their charters, either in express terms or by specific implication. But we have been unable to discover that any well-defined rule has been laid down by the authorities by which we may determine in every case what implied duties are assumed by such a corporation by the acceptance of its charter. It has been held that in the absence of some direct statutory requirement a railroad company cannot be compelled to establish and maintain a station at a particular point on its line, although it may be shown that the convenience of the public demands it. *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 48 Am. & Eng. R. Cas. 475; *People v. New York, etc., R. Co.*, 104 N. Y. 58, 29 Am. & Eng. R. Cas. 480. A contrary doctrine seems to have been acted upon in *State v. Republican Val. R. Co.*, 17 Neb. 647, and in *People v. Chicago & A. R. Co.*, 130 Ill. 175, 40 Am. & Eng. R. Cas. 352. It is one thing to hold that a company which has accepted a charter authorizing it to construct a line of railroad,

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with power to condemn property, and has constructed and is maintaining its line, may be compelled to so operate its line as reasonably to meet the necessities of the public; and, as we think, it is quite a different one that a railroad company, by the acceptance of its charter, which simply makes it lawful to construct and maintain a railroad, assumes an obligation to construct it and to maintain its operation so long as its corporate existence may continue. The latter question was presented in the case of *York & N. M. R. Co. v. Reg.*, 1 El. & Bl. 858. There the company had constructed its line in part only. The purpose of the suit was to compel it by the writ of *mandamus* to construct the entire road. In the court of queen's bench there was a judgment for the relators, two of the judges concurring in opinion and one dissenting. This judgment was reversed in the exchequer chamber by the unanimous opinion of the nine judges who sat upon the case. 22 L. J. Q. B. 225. The chief justice, who delivered the opinion of the court upon the hearing of the writ of error, after stating the facts, propounded the questions to be decided as follows: "Upon these facts several points arise: (1) Does the statute of 1849 cast upon the plaintiffs in error a duty to make this railway? (2) If it does not, is there, under the circumstances, a contract between the plaintiffs in error and the landowners, which can be enforced by *mandamus*? And, failing these propositions, does a work, which in its inception is permissive only, become obligatory by part performance?" The second question does not concern us here. The charter in this case did not involve nor did it grant the taking of private property for the public use. After concluding that there was no language in the statute from which it could be inferred that it was the intention of parliament to make it obligatory upon the company by the acceptance of the charter to construct the entire line of railroad, the court, in their opinion, decided the first question as follows: "It seems to us, therefore, that these statutes do not cast upon the plaintiffs in error this duty, either by express

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words or by implication ; that we ought to adhere to the plain meaning of the words used by the legislature, which are permissive only ; and that there is no reason, in policy or otherwise, why we should endeavor to pervert them from their natural meaning." Upon the third the court speaks as follows : " There remains but one further view of the case to be considered, and of that we have partly disposed in the observations which we have already made. But, inasmuch as Lord Campbell proceeded upon this ground only in the court below, although it was not much relied upon before us in argument, we have, out of respect to his high authority, most carefully examined it, and are of opinion that the *mandamus* cannot be supported upon the ground that the railway company, having exercised some of its powers, and made part of their line, are bound to make the whole railway authorized by their statutes." The opinion throughout bears the marks of the most careful consideration, and is supported, as we think, by argument which cannot be satisfactorily answered.

The authorities upon the precise point are but few. But the question arose in the case of *Minnesota v. Southern Minnesota R. Co.*, 18 Minn. 40 (Gil. 21), and the writ of *mandamus* was refused, because the statute which authorized the construction of the railroad neither in express terms nor by reasonable construction imposed upon the company the specific legal duty of constructing it. The general principle was also affirmed in the case of *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 48 Am. & Eng. R. Cas. 475. The attempt in that case was to compel a railroad to establish and maintain a station at a point where it was alleged the interest of the public required such station. But upon the point decided in that case the decisions are in conflict. The case of *State v. Hartford & N. H. R. Co.*, 29 Conn. 538, presented a question very like that under consideration. In that case the company was chartered to run its line from its initial point to a point on the tide water. It constructed, and for a while maintained, its road to the tide water,

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but, having entered into a contract for a connection with another company, it diverted its line a mile and a half from the water terminus, and ceased to carry passengers to the latter point, though it continued to carry freight. The court held that it could be compelled by *mandamus* to carry both passengers and freight, as required by its charter. But it was contended on behalf of the relators that its charter, by its terms, imposed the duty upon the company to construct and operate its entire line, and especially forbade it to discontinue any part of its line that had been put in operation. On the other hand, counsel for the company maintain that the charter granted the privilege merely, and did not impose a duty. The opinion upon the main question is very brief, and it is impossible to ascertain from it how the court determined the question of the construction of the charter so pointedly presented in the briefs. But in discussing another question in the case the court used this language: "What right have they to covenant with that corporation that they will not run cars to tide water, as the charter provides they shall," etc., from which it may be inferred that they adopted the construction contended for by the counsel for the relators. If the language of the charter is correctly quoted in the brief of counsel, as doubtless it was, we think, that it impliedly made it the duty of the company to continue to operate so much of its line as it should once construct and operate, and that, therefore, the decision is not in conflict with the cases previously cited.

We have a similar difficulty with the case of City of Potwin Place v. Topeka R. Co., 51 Kan. 609, 56 Am. & Eng. R. Cas. 549. That was an action to compel a street-railway company to operate a portion of its line which it had discontinued. The court may have intended to hold broadly that a company which has accepted a mere privilege to build a street railway, and has constructed and operated it, may be compelled by the writ of *mandamus* to continue its operation. The opinion admits of that construction, but the important

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question whether the mere grant of a privilege imposes a duty is not discussed. The ordinance under which the company acted, however, contained a requirement that the "said railway shall be so operated that a car shall pass any given point each way on the route at least every 20 minutes for 12 hours, and at least once every 30 minutes for 4 hours, during that part of the day the road shall be operated." These are words of command, and may be construed as making it the duty of the company, in case it should construct and operate its road, to continue to operate every part of its line. The opinion, we think, might have been safely placed upon this requirement. But whether such was or was not the intention of the court we cannot say from the opinion. In the case of *People v. Albany & V. R. Co.*, 24 N. Y. 261, the company had completed its entire line, but had ceased to operate a part of it; and a suit was brought in equity to compel a specific performance of that duty. It was held that a specific performance could not be compelled in that form of action, and that the suit was properly dismissed. The judge who wrote the opinion expressed the view that the only remedy was by *quo warranto* to forfeit the charter; but in this the majority of the court did not concur. It is evident, however, that the right to a writ of *mandamus* was not involved in that decision. The legislature, in creating a corporation, has the power to give it an option to do or not to do the acts which it is authorized to perform. On the other hand, it may impose upon the corporation, as the law of its creation, the obligation to exercise to their fullest extent the powers which are granted. In either case the proposed corporators may accept or not; and, in the latter, if they do accept, they may be compelled by *mandamus* to perform the duties so imposed. But to say that in granting a charter to do a public service there is no difference between making it lawful to do an act, and imposing it as an obligation to perform it, is to say that by reason of the public interest involved language is to have a different construction and effect

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from what it would have in statutes in general or in private contracts. Expressions may be found in the opinions of courts which countenance that doctrine, but we think there it is based upon an assumption that cannot be maintained upon sound principle. In legislating, the lawmaking power undertakes to determine what is to the interest of the public, and under the limitations of the constitution it is the sole judge of what will promote the public utility, and must be presumed to be capable of expressing its will in intelligible words. When, therefore, a corporation, whether *quasi* public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed. The allegations in the petition in this case show that the respondent company was chartered merely for the purpose of constructing and operating street railways in the city. The special act merely gave it the right of corporate existence for the purpose indicated. *Tugwell v. Ferry Co.*, 74 Tex. 480. The streets were under the control of the city council. The company could do nothing without the consent of the council. The franchise in question was granted by the city council, and the claim is that it is by virtue of that concession, and its acceptance by the company, that the duty arose. But the ordinance (which is quoted above) merely grants "the privilege" of constructing and maintaining street railways over the lines therein designated. No clearer words of mere permission could have been employed. Not only this, but there is in the ordinance neither sentence, phrase, nor word that indicates that it was the intention of the council to make it a condition of the acceptance of its grant that the company should be bound to construct and operate railways over the streets which were therein specified. The company are required to observe all the ordinances of the city then existing, but it is not averred that there was any ordinance in ex-

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istence at the time of the acceptance of the franchise which imposed that obligation. The following succinct and accurate statement of the law from Redfield on Railways has been often quoted with approval: "Where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no specific or adequate remedy, the writ of *mandamus* will be awarded." Redf. R. R. p. 678. It is clear that the ordinance in this case neither by express terms nor by implication imposes the duty upon the company. If the duty to construct and maintain the line is to be established, it must be upon the assumption that every privilege granted by a legislative body in reference to matter of public interest imposes upon the grantee who accepts it the duty to perform the acts he is allowed to perform. The assumption, in our opinion, is, as we have already intimated, not based upon sound reason, and is in opposition, at least, to the weight of authority. Of the numerous similar franchises granted in this state many have doubtless been abandoned, without objection, so far as we are advised, from any quarter. It does not follow that a just objection may not have been made; but the fact that none has been made serves, we think, in some measure to show that the practical construction of such charters has been that the grant is permissive and not obligatory.

We are of opinion also that the fact that the road has been constructed and operated, and that a part is now operated, makes no difference. Under the grant of a privilege to construct and maintain, if after acceptance it is permissive only to construct, it is not obligatory to maintain. But we do not hold that the company can, against the will of the city, operate a part of its line, and not the whole. A privilege to establish an entire line of street railway may be granted when the privilege of constructing and operating a part only would not be, and for a failure to operate a part it would seem that the whole might be forfeited. It seems to

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us that the remedy in this case is to forfeit the franchise to operate the branch line in controversy. The defendant, in its answer, offers to discontinue the operation of the branch, and apparently this would have been a good answer to the petition if an answer had been necessary.

We would not be understood as holding, that the common law does not impose some duties upon companies chartered as common carriers, which may be enforced by *mandamus*, although no mention of such duties may be found in their charters. All carriers who undertake to transport goods or passengers for the public assume certain duties to the public; but certainly carriers who are not corporations may at any time discontinue the business, if they elect to do so, and we see no good reason why corporations may not discontinue their enterprises when the charter does not in express terms or by fair implication forbid it. If it is the will of the legislature, or of a municipal body to whom the power to confer the privilege may have been granted, to impose upon the corporation the duty to construct and to continue to operate the work, instead of a mere permission to do so, it is not difficult so to provide by incorporating into the grant some language which evinces that intention. It follows that, in our opinion, the trial court erred in overruling the demurrer to the petition, and that the court of civil appeals erred in not so holding. It not appearing that that petition may be amended so as to state a good cause of action, the judgment of the court of civil appeals and that of the district court are reversed, and the cause dismissed.

NOTES.

Duty of Corporation to Construct and Operate its Road.—In addition to the authorities discussed at length in the principal case, see the article "Franchises," vol. 8, Am. & Eng. Ency. of Law, pp. 599-615, and see note to 30 Am. & Eng. R. Cas. 515, also see *Sherwood v. Atlantic, etc., R. Co.*, reported in this volume immediately following this note.

In *State v. Southern Minnesota R. Co.*, 18 Minn. 40, the question

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was whether *mandamus* would lie to compel defendant company to construct its road to the village of La Crescent. The court held that neither the acts of Congress nor the Legislature imposed on the railroad company the duty to construct its road to the village of La Crescent, although it was authorized to do so, and therefore *mandamus* would not lie.

See as to whether a company can be compelled by *mandamus* to construct and operate a line of railroad along a street, *People v. Chicago, etc.*, R. Co., 118 Ill. 113, 25 Am. & Eng. R. Cas. 258.

Where a portion of a grant of land to a railroad company has lapsed, and been forfeited by reason of the failure of the company to build a certain part of its road within the time named in the grant, *mandamus* will not lie to compel the railroad company to build that portion of the road to which the forfeiture of the grant attaches. *State v. Southern Kansas R. Co.*, 24 Fed. Rep. 198, 22 Am. & Eng. R. Cas. 198.

Same—Power and Authority.—In *Martin v. Second and Third Street Pass. R. Co.*, 3 Phila. (Pa.) 316, complainants moved for a special injunction to restrain defendants from further use of their road until they had completed it to its northern terminus, Alleghany Avenue. The defendants by the terms of their charter had power and authority to lay out and construct a railway to Alleghany Avenue. The court held that the words "power and authority" were imperative, and that the company might be compelled to complete their road to Alleghany Avenue. Citing *Com. v. Erie, etc.*, R. Co., 27 Pa. St. 351.

Same—Operation.—That railroad company will be coerced into operating its road after construction, see *Talcott v. Pine Grove Tp. 1 Flipp.* (U. S.) 145.

In *Chicago, etc.*, R. Co. *v. Crane*, 113 U. S. 424, it was held that where a railroad company abandoned a portion of its line which it was its duty to maintain, *mandamus* would lie to compel the maintenance and operation of such portion of its road.

Where a railroad company constructs and operates its road over its line, under the powers and privileges of its charter, it cannot thereafter abandon the same, even though its charter, in its inception, was merely permissive and mandatory. *Farmers' L. & T. Co. v. Henning*, 17 Am. L. Reg. N. S. 266.

In *Potwin Place v. Topeka, etc.*, R. Co., 51 Kan. 609, 56 Am. & Eng. R. Cas. 549, *mandamus* was granted to compel a street railway company to operate its lines.

Same.—Where a peremptory writ of *mandamus* was granted by the district court against a street railway company to compel it to run its cars over a certain portion of its line, and the railway company sought to have the judgment reviewed in the supreme court and to compel the district court to fix the amount of the *supersedeas* bond, *held*, that there was no provision of the statute requiring such court or judges to fix the amount of the undertaking in such case. *State v. Judges*, 19 Neb. 149.

Mandamus to Compel a Railroad Company to Relay a Portion of its Road—Sufficiency of Return.—The return to an alternative writ of *mandamus* requiring a railroad company to relay a certain portion of its road, which it had torn up and dismantled, and to re-equip, maintain, and operate the same as a narrow-gauge railroad, showed, in substance, that the respondent company had been

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formed by consolidation of several other companies; that it had acquired the portion of road in question (at the time a narrow-gauge) from one of these companies and with it the rights, privileges, and immunities secured by the charter of said company, among which was the power and right at any time to alter and change its roadbed, or any part thereof; that because the bridges, iron, and ties on the road acquired from said company had become worn out, dangerous, and unfit for use, and for other considerations relating to the business of respondent and the convenience and safety of the public, respondent, in pursuance of authority derived from the public statutes of the state and a vote of more than two thirds of its board of directors, had determined to change the whole of said road (of which the portion of road in question was but a part) to a standard-gauge road; that respondent had actually made and completed this change on all of said road except the portion in question, and on that portion, for purposes of economy, convenience, and safety, had caused a new route to be surveyed, and was proceeding with all reasonable dispatch to construct said changed line, and had provided the materials and equipments necessary for the operation of the same as a standard-gauge road, and expected to complete the same within four months, which was as soon as it could be done with due and proper consideration of respondent's other business, economy, efficiency, and the safety and convenience of the public; that respondent was in the meantime furnishing to the public all needed facilities in conveying persons and property between the *termini* of said dismantled line; that all of respondent's other lines were of the standard gauge, and that it was wholly impracticable successfully, efficiently, and economically to maintain and operate the portion of road in question in connection with the rest as a narrow-gauge. *Held*, that full authority for making the changes is set forth in the return and admitted by the demurrer that what is a reasonable time, or a sufficient time, in which to perform the work in progress depends upon the circumstances of the case, of which the court is not sufficiently informed to judge; that if, as a matter of fact, the respondent is not in the exercise of such diligence as is requisite in the prosecution of the work of making the change, the point can be appropriately raised by a traverse of the allegation of the return; that the return is sufficient in law; and that the relator, if so advised, may plead further. *State v. Missouri Pac. R. Co.*, 80 Mo. 117; *People v. Chicago West Division R. Co.*, 118 Ill. 113, 25 Am. & Eng. R. Cas. 261.

Mandamus—By Private Citizen to Control Location of Railroad—Public Interest the Test.—Plaintiff, a resident tax payer of the town of Polk City, for himself and others, sought to compel the defendant to relocate its main line of railroad so as to run through said town, on the ground that it had originally been so located, and had been aided in its construction by a tax raised in the township, and also by a grant of lands from the county, all upon the condition that it should run by Polk City. *Held* that, unless the interests of the general public were shown to be injuriously affected by defendant's removal of its main line from said town, while it yet gave the town railway facilities by means of a branch, plaintiff was not entitled to the relief asked for,—his personal damage, if any, not being ground for such relief. *Crane v. Chicago, etc., R. Co.*, 74 Iowa 330.

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SHERWOOD *et al.*

v.

ATLANTIC & D. R. Co.

(Supreme Court of Appeals of Virginia, Feb. 11, 1897.)

Railroads—Liability of Purchaser for Obligations of Predecessor.—Contracts and obligations of a railroad company entered into subsequent to a mortgage of its property do not devolve upon the purchaser of its property on foreclosure sale.

Same—Maintenance of Terminals.—The obligation imposed by its charter upon a railway company to construct its line to one of two points and establish a terminal there, is satisfied by the construction of its line to, and the maintenance of a terminal at, either of such points, and it cannot be compelled to maintain terminals at, and lines to, both of such points, although it may have constructed them to both of the points, nor can the purchaser of its franchises be required to do so under a state statute requiring railroad corporations succeeding to old corporations to operate any branch or lateral road which had been constructed and operated by its predecessor.

Same—Mandamus.*—A writ of *mandamus* will not lie to compel the maintenance by such company of both of such lines and terminals when their maintenance will entail incommensurate expense and loss upon the company, and when sufficient provision has been made to handle travel and freight through one of such lines and terminals.

Writ denied.

R. C. Marshall, J. W. Happer, and Christian & Christian, for petitioners.

Tunstall & Thom and Walke & Old, for respondent.

KEITH, P. Sherwood and others presented their petition to this court praying that a writ of *mandamus* might issue requiring the Atlantic & Danville Railroad Company to replace its tracks from Shoulders Hill to its former terminal station in the city of Portsmouth, and re-establish it as the ter-

Case Stated.

*See San Antonio St. R. Co. v. State and note reported immediately preceding this case.

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terminal station of its line, and to establish and maintain its general offices, freight and passenger depots, within the city of Portsmouth, Va.

To this petition the Atlantic & Danville Railroad Company filed its answer, and depositions were taken upon behalf both of petitioners and respondent.

From the pleadings and proofs it appears that the Atlantic & Danville Railroad Company was incorporated by an act of the general assembly of Virginia approved April 21, 1882, as amended by acts of February, 1886, May, 1887, and the acts of the extra session for 1887. By its charter the railroad company was empowered, among other things, to construct, equip, and maintain a railway "from any point on its main line east of the town of Hicksford, through the counties of Greenville, Sussex, Southampton, Nansemond, Isle of Wight, and Norfolk, or any and all of them, to a point on the Elizabeth river in or near the city of Norfolk, or in or near the city of Portsmouth; and also to construct branch roads in this state, none of which shall exceed sixty-five miles in length." The road from a point on the main line east of Hicksford through the counties just mentioned to West Norfolk, a point on Elizabeth river, in Norfolk county, was constructed and put in operation by virtue of the charter and the several acts amendatory thereof. On the 7th of September, 1887, the railroad company executed a mortgage conveying all its works, property, and franchises then owned or thereafter acquired to the Mercantile Trust Company as trustee, to secure the payment of the bonds and coupons of the railroad company. After the completion of the road to West Norfolk, a point on Elizabeth river, in the county of Norfolk, about seven miles distant from Shoulders Hill, negotiations were entered into between the railroad company and the city of Portsmouth, by which, in consideration of the city of Portsmouth agreeing to subscribe for \$150,000 of the capital stock of the company, and to issue the bonds of the city, payable in 30 years, in payment of said subscription, the railroad

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company undertook to lay down its track from Shoulders Hill, which was also about seven miles from the city of Portsmouth, and to establish its terminals upon the property of the Seaboard Cotton-Press Company in the said city, and to locate its general offices, freight and passenger depots, round-houses, shops, and freight yards within or adjacent to the city limits. The railroad company further agreed to abolish the passenger transfer business then existing between Norfolk and West Norfolk, and to do its passenger and local freight business through Portsmouth exclusively.

In pursuance of authority conferred upon it by the general assembly, the city of Portsmouth ordered an election to be held to ascertain the sense of the voters upon this proposition. The election was held, the offer of the company was accepted, the bonds were issued, the road was built from Shoulders Hill to the Seaboard Cotton-Press Company, the offices, freight and passenger depots, and shops were located in accordance with the contract, which seems to have been executed fully and in good faith by both of the parties thereto for some years thereafter. This arrangement appears to have been advantageous to the city of Portsmouth. The company, however, never prospered. From causes which need not be discussed it became embarrassed, and finally bankrupt, and on the 3rd of January, 1891, B. Newgass & Co., having obtained a judgment against it for a very large sum, instituted in the circuit court of the United States for the Eastern district of Virginia a suit for the sale of the property for the purpose of satisfying their judgment, and caused the property to be placed in the hands of Alfred P. Thom and Charles B. Cromwell, as receivers of the said circuit court. In the meantime, default having been made in the payment of the interest upon the bonds secured by the mortgage to the Mercantile Trust Company, that company became co-plaintiff in the suit; and such proceedings were had in the cause that on the 20th of November, 1893, a decree was entered for

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the sale of all the property and franchises of the Atlantic & Danville Railroad Company.

Pursuant to the terms of the decree, a sale was made on the 3rd of April, 1894, and at the sale B. Newgass & Co., one of the complainants, and O. H. Edinger, became the purchasers, and the sale was confirmed by a decree entered on the 26th day of April, 1894. By this decree Alfred P. Thom, who, by the death of Charles B. Cromwell, had become the sole receiver of the property, was ordered to continue to operate the line of railway after the sale and until the conveyance and delivery of it was made to the purchasers, at their risk and for their benefit.

On August 1, 1894, an order was made in the cause, which directed that the premises and property should be delivered to the purchasers, and that a conveyance should be executed of all the works, property, and franchises of the railroad company. On the 2d day of August, 1894, a conveyance was executed in accordance with the terms of the decree, and the purchasers adopted in the deed the corporate name of the Atlantic & Danville Railway, the name of the old corporation, in accordance with the statute of Virginia in such case made and provided; and the Atlantic & Danville Railway Company became a corporation in the state of Virginia, and has since operated said railway.

After the sale had been made and confirmed to the purchasers, and before the execution of the deed, to wit, on the 16th day of June, 1894, the purchasers requested the receiver to take immediate steps to abandon the Portsmouth terminal, which request the receiver submitted to the court; and thereupon the court entered a decree that the receiver "be, and is hereby, permitted to abandon the city of Portsmouth as the terminus of the Atlantic & Danville Railway Company, and the use of the street leading to the terminus in said city, and so much of the route between Shoulders Hill and Portsmouth as he may think advisable." This order was entered on the 16th day of June, and on the 27th day of June, 1894, the receiver, pursuant to the order, abandoned the city of Portsmouth as the terminus of

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the railway company, and the line leading to its terminal station in the city, and removed from the city of Portsmouth all the railroad tracks of the company, its shops and round-houses, and from that time the company has failed and refused to replace the tracks, and to establish and maintain the said offices, shops, and round-houses within the limits of the city of Portsmouth.

It further appears that the purchasers were fully informed at the time of the purchase of all that had taken place between the city of Portsmouth and the railway company with respect to the subscription to the stock, the issue of the bonds, and of the consideration moving from the railway company. After the terminal had been established in Portsmouth in accordance with the terms of its contract, the railway company became satisfied that the facilities afforded were altogether inadequate for the transaction of its business, and that, as compared with its terminal at West Norfolk, it was far less convenient, and in every way less desirable, and in the opinion of the officials of the road entailed an outlay over and above what was necessary to handle the same business at West Norfolk of about \$27,500 annually, which constituted an important item in the burden of debt by which the road was finally overwhelmed.

At the time of the sale the claims allowed by the court, and having priority to the mortgage, amounted to \$938,785.51. More than the debts having priority the debt due by the mortgage only received as its distributive share a little more than 3 per cent. We have thus stated in some detail the principal facts connected with this controversy.

We are of opinion that the contract entered into between the Atlantic & Danville Railway Company and the city of Portsmouth is not binding upon the present company. All contracts of the old company which did not constitute liens, and all liens which were subordinate to the mortgage which was executed on the 7th of September, 1887, to the Mercantile Trust Company as trustee,

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Obligations of
Predecessor.

cease to have any binding force or obligation upon the purchaser at a sale under that mortgage, but such purchaser takes the property free of and discharged from all such liens and contracts. If it were otherwise, it would, in the language of the supreme court of the United States, "put an end to purchases of railroads." See *Hoard v. Railway Co.*, 123 U. S. 226, 36 Am. & Eng. R. Cas. 429, where the court says: "The persons who purchased the railroad at the mortgage foreclosure sale did not thereby, under any statute of the state, * * * or any contract, of which we are aware, become obliged to pay the debts and perform the obligations of the railroad company. They bought the property of that company and its franchises, and if, as such purchasers, they thereby became bound to pay all the debts and perform all the obligations of the corporation whose property they bought, it would put an end to the purchases of railroads." And so in *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 28 Am. & Eng. R. Cas. 35: "Such a contract obligation is not a lien or charge upon the property of the railroad company, and does not devolve upon the purchaser of the property on foreclosure sale, or upon a new corporation organized under the statute to operate the road."

As is well said in respondent's brief: "We believe that this is universally recognized as law. It is based on reason as well as authority. No man or company can be allowed to mortgage property, and then destroy its value by loading it up with obligations created after the mortgage is made."

In entering into a transaction of so much consequence with an insolvent corporation unable to comply with its engagements, the city of Portsmouth may have been unwise, imprudent, or unfortunate, but perhaps has no greater right to complain than the bondholders, who must content themselves with 3 per cent. upon their demands.

In so far, therefore, as the right of the petitioners to a *mandamus* is supposed to flow from any contract entered into between the city of Portsmouth and the old

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company known as the Atlantic & Danville Railroad Company, it must be denied.

By the charter of the railroad company it was required to build its road from a point upon its main line to the east of Hicksford to a point on the Elizabeth river in or near the city of Norfolk, or in or near the city of Portsmouth. Under its charter it

Name—Maintenance
of Terminals.

was compelled to make its terminal on the Elizabeth river. The location of that terminus was, at the option of the company, a point in or near the city of Norfolk, or in or near the city of Portsmouth. It chose West Norfolk, which is on the Elizabeth river, about three miles from the city of Portsmouth, and seven miles from Shoulders Hill; and there established its depots and terminals. It was the duty of the company under its charter "to build a railroad from a point on its main line east of the town of Hicksford * * * to a point on the Elizabeth river." It was required by its charter to have but one terminal on the Elizabeth river; and, were we to compel it to re-establish its line into the city of Portsmouth, in accordance with the prayer of the petition, then it would either be compelled to maintain two terminal points on Elizabeth river, one in or near the city of Norfolk, and another in or near the city of Portsmouth, which would be to impose upon it a duty in excess of that required by its charter, or else permit it to abandon the point originally selected by it as its terminus, and make a point in the city of Portsmouth its sole terminus, when its obligation is equally as great, to say the least, to preserve its terminal at the point originally selected by it upon the Elizabeth river, when it exercises the privilege and option with which it was clothed by its charter.

We are of opinion, therefore, that in so far as the right of the petitioners to the *mandamus* prayed for depends upon the duty of the railway company to establish and maintain a terminal on the Elizabeth river in or near the city of Norfolk, or in or near the city of Portsmouth, the obligation imposed by the charter is

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satisfied by the construction and maintenance of its terminal at the point originally selected by it at West Norfolk.

The railway company constructed a line from Shoulders Hill to Portsmouth in execution of the contract which it had entered into with that city, and for several years maintained and operated it from Shoulders Hill to the Seaboard Cotton Press in the city of Portsmouth; and it is contended by petitioners that if the company cannot be compelled to maintain and operate this line as its principal terminal, it comes within the description of a branch road, and is within the influence of section 1234 of the Code, as amended by Acts 1891-92, p. 623. The section, as amended, is as follows:

"The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights, and privileges, and perform all such duties as would have been had, or should have been performed, by the first company, but for such sale and conveyance, including the duty of maintaining and operating any branch or lateral road which may have been constructed and operated before the sale, and of transporting freight and passengers thereon, save only that the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of, or claims against, the said first company which may not be expressly assumed in the contract of purchase, and the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns."

Section 1234, as it is found in the Code of 1887, does not contain the words, "including the duty of maintaining and operating any branch or lateral road which may have been constructed and operated before the sale, and of transporting freight and passengers thereon," and the contention is that the legislature, in introducing by way of amendment the language quoted, intended to impose upon the company created by the sale and conveyance not only all the duties which should have been performed by the old company, but,

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in addition thereto, the duty of operating any branch or lateral road which had been constructed and operated by the original company; and it is insisted that, unless this interpretation be placed upon the amendment, it is wholly inoperative and meaningless.

It is true that the present Atlantic & Danville Railway Company is a corporation created by and in consequence of such a sale and conveyance as is referred to in the section just quoted, and that it has succeeded to all the franchises, rights, and privileges, and is bound to perform all such duties as would have devolved upon the first company but for such sale and conveyance; but it is obvious from the terms of the statute that it was not intended to impose upon the new company any additional or higher duty than already rested upon the original company. It is bound to perform all "such duties" as could have been required of the first company, but only such duties as could have been required of the original company. If a duty rested upon the original company to maintain and operate the line from Shoulders Hill to a point within the city of Portsmouth of such a character as a court would enforce by *mandamus*, then the new company is equally bound to perform it, and is equally liable to be compelled to do so by *mandamus* or other appropriate remedy. It is necessary, therefore, to consider whether or not there was a duty under the charter resting upon the old company which the courts would, by *mandamus*, compel it to perform, to operate and maintain the line of road in question from Shoulders Hill to a point in the city of Portsmouth; and this brings us to consider the distinction between those powers and duties conferred upon a railroad company which it may be compelled to perform and those of a merely permissive character.

The language of the charter is: "That the said corporation is * * * also hereby authorized to construct, equip, maintain, extend, and operate its railway from any point on its main line east of the town of Hicksford through the counties * * * and Norfolk to a point on the Elizabeth river either in or near the

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city of Norfolk or in or near the city of Portsmouth." Acts 1887, p. 188.

By the sixteenth section of the charter (Acts 1887, Ex. Sess., p. 191) is it said: "The said railway is authorized to construct branch roads in this state, none of which, however, shall exceed 65 miles in length."

We have shown that the present Atlantic & Danville Railway Company, coming into existence as a purchaser under proceedings in a suit to foreclose a mortgage, acquired the property and franchises of the original railway company discharged of any obligation growing out of the contract between the old company and the city of Portsmouth; and that the charter of the old company imposed no duty upon it with respect to maintaining a terminal at Portsmouth beyond giving it the power to select between two points,—one in or near the city of Norfolk, and the other in or near the city of Portsmouth, and both of them upon the Elizabeth river; and that this duty imposed by the charter had been fully met and satisfied by the selection, in the first instance, of a point on the river at West Norfolk; and we have also shown that the duties imposed upon the new company were only such as rested upon the old company.

In placing this construction upon section 1234 as amended, we are not unmindful of the cardinal rules which apply to the interpretation of statutes. It is the duty of the court to ascertain the intention of the legislature, and when ascertained, to give it effect; and in search for that intent it is its duty to consider the object of the statute, and the purpose to be accomplished. It must reach the intent, however, by giving to the words used their ordinary and usual signification, and to every word and every part of the statute, if possible, its due effect and meaning. It cannot, in order to accomplish the presumed intent, place a forced and strained construction upon the language used, as that would be to enable the court to do what, in its judgment, the legislature ought to have done, rather than to interpret and enforce what the legislature had

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done; and thus, in the effort to apply a remedy in a particular case, arrogate to itself a power susceptible of great abuse. The intent of the legislature, therefore, is always to be sought for by giving a fair construction to the language used, attributing to the words their ordinary and popular meaning, unless it plainly appears that they were used in some other sense.

In the case before us the meaning of the language used seems plain, and leads to no conclusion which can be deemed absurd in itself, or necessarily repugnant to the legislative intent. It is true, of course, if we assume as a premise that the legislature did intend to impose an additional duty upon the new company, and then find as a fact that it failed to accomplish that purpose, that the repugnancy is established. But why make such an assumption? Why, we may ask, should any additional duty have been imposed upon the new corporation? The mere act of organization under the purchase creates no new necessity to be met by the imposition of a new duty or obligation. The needs of the community remain as they were. The same freight is to be moved, and the same passengers are to be accommodated. Why, then, should the legislature have intended to create a duty to be discharged by the purchaser which was not incumbent upon the original company? Should the growth and development of the community tributary to a line of railway cause a demand for facilities for the accommodation of traffic which it is able but unwilling to furnish, it cannot be doubted that there is power in the legislature and courts acting within their appropriate spheres to compel the recalcitrant corporation to provide for moving the freight and passengers offered it in a satisfactory manner, and, indeed, to discharge any and all duties it may owe to the public; but this power would only be exercised in case of necessity, and not arbitrarily, where no public necessity is shown to exist.

It may be that the object of the amendment was to require the new company to perform the duties im-

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posed upon the old corporation subsequent to the execution of the mortgage or other lien under the sale to enforce which the conveyance was made and the new company organized; and to prevent the new company from evading the performance of such duties by the plea that it claimed under liens established at a time when the old corporation had not been subjected to the duty to be imposed. It is not for us, however, to indulge in mere conjecture as to the motive actuating the legislature, for it is plain that, if the intent was to impose upon the new company duties which at no time attached to the old, that intent has not been expressed, and we cannot interpolate it by construction.

We have been unable to escape the conclusion that the act requiring the new company to perform "all such duties as * * * should have been performed by the first company, * * * including the duty of maintaining and operating any branch or lateral road which may have been constructed and operated before the sale," does not impose any duty upon the new company which did not rest upon the old one.

It will scarcely be contended that there was any duty imposed upon the original company to build or to operate a branch line from Shoulders Hill to a point within the limits of the city of Portsmouth. It is true that under its charter it was permitted to build a branch line, and that, in order to induce it to build this branch, the city of Ports- Same—Mandamus. mouth, under authority of law, subscribed \$150,000 to its capital stock; but this fact in itself furnishes a strong argument against the existence of the duty under the charter to build, for the city of Portsmouth, it is to be presumed, would have compelled the performance of the duty by *mandamus* had it existed, rather than have resorted to negotiation and bargain, and in the end pay a great price for what it might have demanded as a right. Under the charter the company was permitted, but was not required, to build this branch from Shoulders Hill to the city. The idea, however, seems to be entertained that, though it

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was not a duty to construct this branch road, yet that, having been constructed, it becomes a duty to maintain and operate it, regardless of all consequences; while on behalf of the company the contention is that, having fairly tested the advantages and disadvantages of operating the branch line from Shoulders Hill into the city of Portsmouth, the determination had been reached to abandon it, because its maintenance involved the cost of keeping two terminals, at an outlay wholly incommensurate with the benefits conferred and the demands of traffic to be accommodated by it; that the business of the road did not justify such an expenditure; and to continue it would put in jeopardy the existence of the road, and might disable it to perform its duties as a carrier of freight and passengers on other portions of its line; and that the provision made for the accommodation of the passengers and freight received from and taken to the city of Portsmouth was under the condition and circumstances reasonably sufficient. The evidence strongly tends to maintain these positions of the respondent.

In *Com. v. Fitchburg R. Co.*, 12 Gray, (Mass.) 180, it is said;

"It is plain that the power to judge of what is necessary or reasonable in the premises is, except in those cases where the legislature has expressly intervened, in the first instance, in the corporation. It is clear that the duty required is not more than to meet and supply the public wants. These are measured by the business actually done, or what could be clearly shown would be done if increased facilities were granted. There is nothing in the language of the statutes requiring, nor can any just implication from the powers and privileges conferred upon the corporation require, that trains for passengers or freight should be provided, which are not wanted, or which the business upon the road would utterly fail to support. * * *

"It would seem to be, therefore, not only its right, but its duty, to exercise a sound discretion in the use of its capital, lest by exhausting it upon trains that

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were not required by the public wants it should deprive itself of the means of running at reasonable rates those that were.

"The point is made in the argument for the commonwealth that because for a time the respondents have maintained the road in running regular trains for freight and passengers, they are bound to continue to run until authorized by the legislature to stop. We cannot see that a beginning to run these trains rendered their continuance, at whatever cost or sacrifice, a legal duty. It might be more plausibly said that it was the duty of the corporation, after a road was built, to make the trial of running regular trains for passengers and freight; that they were not to presume beforehand that the business would be inadequate; that it was difficult to foresee or anticipate all the business which would find its way to the road, and therefore the experiment should be fairly made. But when trial had been fairly made, and had proved disastrous, the duty would have been discharged."

See, also, *Ror. R. R.* 43; *State v. Sioux City & P. R. Co.*, 7 Neb. 357, 374; and *People v. Rome, W. & O. R. Co.*, 103 N. Y. 106, 28 Am. & Eng. R. Cas. 35.

See, also, *Mor. Priv. Corp.* § 1119, where it is said: "The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in operation; and in such case the company may cease operating the road, unless this be contrary to the express terms of its charter."

In *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 498, 499, 48 Am. & Eng. R. Cas. 475, the court uses the following language:

"A writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

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"If, as in *Railroad Co. v. Hall*, 91 U. S. 343, the charter of a railroad corporation expressly required it to maintain its railroad as a continuous line, it may be compelled to do so by *mandamus*. So, if the charter requires the corporation to construct its road and to run its cars to a certain point on tide water (as was held to be the case in *State v. Hartford & N. H. R. Co.*, 29 Conn. 538), and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And *mandamus* will lie to compel a corporation to build a bridge in accordance with an express requirement of statute.

"But, if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by *mandamus* to complete or to maintain its road to that point, when it would not be remunerative."

These authorities, which seem to be consonant with reason, establish the proposition that the writ of *mandamus* can only be used to enforce duties and obligations clearly imposed by the charter or general law, and not to enforce and establish those of doubtful expediency and propriety.

It may be asked, is a corporation having constructed a road to be permitted to abandon its use at its pleasure? We answer that it is not to be apprehended that the corporation will abandon any part of its line, the operation of which is found remunerative in the present, or that is likely to become so in the future. Where the line of railway, taken as a whole, cannot be profitably maintained; where its operation, when discreetly and economically managed, is attended with loss,—it is difficult to perceive how a court can, by *mandamus* or otherwise, compel its operation to be continued. If the loss is the result of improvident and unthrifty management, the court may, at the suit of those interested, take charge of it for the benefit of all concerned, and run it through the instrumentality of a receiver; but if the traffic of the road is really insufficient to support a

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wise and economical administration of its affairs, there would seem to be no escape from its ultimate abandonment. Such cases are possible, though rare. It more frequently happens, however, that a part of the line becomes unprofitable, though the system as a whole may be valuable. In such an event the court will inquire, first, as to the positive duties imposed by the charter, and compel their performance by appropriate remedies, while with respect to those duties which were not imposed by the charter, but which have been assumed by the corporation under permissive grants of power, it will consider all the circumstances of the case, and if upon the facts it shall appear that the duty unfulfilled inflicts no particular injury or hardship upon those who make the complaint, and that the service which they receive is under all the conditions reasonably adapted to their needs, while the performance of the duty would entail a burden and loss upon the company far in excess of any benefit conferred, and which might in its ultimate effect embarrass or prevent the performance of other duties with respect to larger interests and affecting a far greater number of citizens, the court will withhold its hands. This proceeding, while in the name of certain citizens of Portsmouth, is, in effect, on behalf of the commonwealth; and the courts should not require an act to be done which, while it may inure to the benefit of a few, might end in disaster to the interests of many.

We have said nothing in the course of this opinion with respect to so much of the prayer of the petition as asks for the re-establishment in the city of Portsmouth of the depots, roundhouses, and shops, for, if the petitioners have not made out a case for the restoration of the roadway, it is yet more certain that they have failed to present a case calling for the interference of the court with respect to the other subjects of their contention.

The writ of *mandamus* is refused.

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BARKER

v.

CENTRAL PARK, N. & E. R. CO.*

(151 N. Y. 237.)

Fares—Tender of Large Amount—Reasonableness—Question of Law.—A passenger on a street car when called upon for his fare of five cents replied that he had no change less than five dollars, and tendered it to the conductor who declined to change it and ejected him from the car. In an action to recover for such ejection it was stipulated at the trial that the street-railway company had a rule requiring its conductors to be prepared to furnish change to the amount of two dollars, that such rule was not brought to the attention of the plaintiff, and that there was no rule forbidding the giving of change for a larger amount. There was evidence that the plaintiff had on another occasion tendered five dollars on another line and received change, but there was no evidence that there was a custom on the part of the plaintiff or the public generally of tendering five dollars in payment of a five-cent fare. *Held*, that there was no evidence to warrant the submission of the question of the reasonableness of the tender to the jury, but that it was unreasonable as a matter of law.

APPEAL from New York city and county court of common pleas, general term. *Affirmed*.

Samuel H. Ordway, for appellant.

Henry Thompson, for respondent.

BARTLETT, J. This appeal presents a novel question, which has not been considered by this court in any case to which our attention has been called. No opinion was written in the court below. The defendant corporation operates a horse railroad in the city of New York as a common carrier of passengers. On the 12th of January, 1889, the plaintiff entered one of the defendant's cars as a passenger, and, when called upon for his fare of five cents, found that the smallest amount of money in his possession was a five-dollar

*See note at end of case.

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bill. The plaintiff offered the bill to the conductor, who stated: "I am not supposed to change it. You must get off." To this the plaintiff replied: "I won't get off. You must put me off." The conductor thereupon put the plaintiff off the car. It is not claimed that he used any more violence than was necessary, or that the plaintiff was actually injured in person or property.

The transaction was undoubtedly a technical assault and battery, and the plaintiff seeks in this action to recover his damages therefor. It may be conceded, as was urged by plaintiff's counsel in his very able argument, that, if plaintiff was unlawfully ejected from the car, this is a case for substantial damages. A number of points were discussed at the bar, but, in the view we take of this case, there is but one question to be considered. The plaintiff's counsel asked to go to the jury on several questions, and, among others, the following: "Whether the five dollars was in this case, and under the circumstances testified to, a reasonable amount for the plaintiff to tender the conductor in payment of his fare?" The complaint was dismissed at the close of the plaintiff's case, and the point is made whether the reasonableness of the tender of five dollars to the conductor is a question of law or a question of fact on the evidence. It was stipulated at the trial that the defendant had a rule requiring its conductors to be prepared to furnish change to the amount of two dollars, and that such rule was not brought to the attention of plaintiff. It was further stipulated that there was no regulation forbidding the conductors to make change to a greater extent than two dollars. On cross-examination of the plaintiff he testified as follows: "Q. Why did you say to the conductor, before making any tender, 'I have only got a five-dollar bill'? A. Well, because I felt rather apologetic about offering that large amount, because I didn't know whether it might inconvenience him with using up a great deal of his change or not, and, of course, I wouldn't have offered five dollars if I had anything else, and I wanted

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to explain it." It thus appears that the plaintiff regarded his offer of the five-dollar bill as unusual and requiring explanation. There is no evidence of a custom on the part of the plaintiff or the public of tendering to defendant five dollars in payment of a five-cent fare, and receiving the change, nor of any rule of the defendant imposing upon their conductors the duty of furnishing passengers with change in so large an amount. The plaintiff swore to one occasion when he had offered a five-dollar bill for his fare, and had it changed, but it was on the car of another line. There is no evidence which would have warranted the trial judge in submitting to the jury the question whether the plaintiff's tender of the five-dollar bill, under the circumstances, was unreasonable. On the evidence as it stands, the plaintiff's tender of the five-dollar bill was unreasonable as a matter of law, and the undisputed facts are not of such a nature that reasonable men might differ in regard to the inferences proper to be drawn from them. In this state of the record it is well settled that there is no question for the jury. *Vedder v. Fellows*, 20 N. Y. 126; *Hibbard v. Railroad Co.*, 15 N. Y. 455, 459, 460; *Avery v. Railroad Co.*, 121 N. Y. 31, 44. It is quite apparent that a carrier of passengers must make and enforce such reasonable rules as will enable it to discharge its duties to the general public in a proper manner, and if the facts are undisputed, and not susceptible of different inferences, the question of their reasonableness ought not to be submitted to a jury, who might not readily understand the reasons upon which the rule is sought to be founded. If the question is treated as one of law, uniformity is secured,—a matter in which the public are interested quite as much as the corporations who are carriers of passengers. In the case at bar the reasonableness of the rule established by the defendant is obvious. In a large city like New York, the round trip of a car of any street line means a very considerable number of fares paid in, and the necessity for the conductor to carry and pay out a large amount of small change.

Note.

When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of two dollars, it did all that could reasonably be expected of it in consulting the convenience of the general public, and it would be unreasonable and burdensome to extend the amount to five dollars. It would require conductors to carry a large amount of bills and small change on their persons, and greatly impede the rapid collection of fares. It is not necessary that a common carrier should bring home to each passenger a personal knowledge of any reasonable and just rule which it is seeking to enforce. To so hold would render the enforcement of the rule impracticable. We have been cited to but one case holding with the plaintiff in this action. *Barrett v. Railway Co.*, 81 Cal. 296. We agree with the learned supreme court of California that a passenger upon a street railroad is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender and furnish change to a reasonable amount; but we cannot assent to the conclusion that a tender of five dollars is a reasonable sum. It is quite possible that there existed local reasons for the decision in California, as the judge writing the opinion suggested that the five-dollar gold piece was practically the lowest gold coin in use in that section of the country. The plaintiff urges that there are several other questions than the one of reasonableness of amount tendered that should have been submitted to the jury. We have considered these questions in the light of the record as it stands, and are of opinion that the dismissal of the complaint was proper. The judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

NOTE.

Tender of Fare—Change.—The plaintiff got upon the train without a ticket, and when asked for his fare declined paying then, as he had not made up his mind how far he should go. Defendant, the conductor, said he must decide, and afterwards, on his declining

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again on the same ground, stopped the train and put him out, at a place a mile and a quarter from the last station and within half a mile of a house. The plaintiff at last tendered a \$20 gold piece, telling the conductor to take his fare, \$1.35, out of it. *Held*, that the plaintiff had refused to pay his fare, within the meaning of the 14 and 15 Vic. Ch. 51, sec. 21, sub-sec. 6, and that defendant was justified in what he did; and that the jury having found for the plaintiff, a new trial was granted without costs. *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428.

A passenger on a street-car is not bound to tender the exact amount of his fare, but may tender any reasonable sum, and the conductor must furnish change. Five dollars is not an unreasonable amount to tender. *Barrett v. Market St. R. Co.*, 40 Am. & Eng. R. Cas. 671, 81 Cal. 296.—*Distinguishing* *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428.

MOSS *et ux.**v.*

PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania, March 22, 1897.)

Street Railways—Injury to Child in Street.*—A child upwards of three years old, while playing in the street, was struck and killed by a street car, the car stopping almost instantly after the child was struck. There was no evidence of want of care on the motorman's part, and the only evidence that the car was going at an unusual rate of speed consisted in indefinite statements by various witnesses as to the rate at which the car was going. *Held*, that a judgment of nonsuit was properly granted.

APPEAL from Philadelphia county court of common pleas. *Affirmed.*

B. Frank Clapp and *William W. Willbank*, for appellants.

J. Howard Gendell, for appellee.

FELL, J. It is unnecessary to consider whether, under the circumstances disclosed by the testimony, contributory negligence should be imputed to the plaintiff.

*See notes at end of case.

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iffs in allowing their child to escape from the house, and wander in the street unattended, as we see nothing in the testimony which will sustain a finding of negligence on the part of the defendant company. A child three years and eight months old was playing on the street. When last seen by any of the witnesses before the accident, she was jumping rope, and running across the street from one side to the other, and at some distance from a crossing. No witness called saw the accident. The car stopped almost immediately after the child was struck. The plaintiff's case rested upon the allegation that the car was run at undue speed. Of this the only evidence is found in vague declarations of the witnesses, who admittedly gave no attention to the car as it approached them. These witnesses speak of the car as "coming at a pretty full rate," "going unusually fast," and "almost as fast as it could." The two witnesses who undertook to state how many miles per hour it was going admitted on cross-examination that their estimates were the merest conjectures, that they paid no attention to the movements of the car except to notice that it was coming down the street. They had seen the child playing on the street, and their attention was next arrested by the stopping of the car. The accident did not occur at a crossing. There is no evidence that the motorman was not giving close attention to his duties, or that the child could have been seen by him in a position of danger, until the moment of the accident; and the evidence is clear that the car was stopped almost instantly after the child was struck. In *Woeckner v. Motor Co.*, 176 Pa. St. 451, cited by the appellants, the motorman saw the child approaching the track, and knew of the danger in time to guard against it. He went on after he could have stopped, assuming that the child would not cross the tracks. In this case there is not the slightest evidence of want of care on the part of the motorman either before or after the child was seen by him. No inference of negligence can be drawn from the indefinite statements of the wit-

Notes.

nesses as to the speed of the car which is not repelled by the fact that the movements of the car were under such complete control that it was stopped at once. The judgment is affirmed.

NOTES.

Children—Injured in Street—Contributory Negligence.—See 2 Rap. & Mack's Dig. 742-758; notes to 1 Am. & Eng. R. Cas. 157; 2 Id. 16; 6 Id. 63; 31 Id. 419; 35 Id. 394; 1 Am. & Eng. R. Cas. N. S., 257. In *Chicago West Division R.Co.v.Ryan*, 43 Am. & Eng. R. Cas. 396, 131 Ill. 474, it was held that if a child ran on the track so suddenly that the driver has no such notice of danger as to give him an opportunity to avoid the injury by the exercise of ordinary care, the child could not recover. See, also, *Kennedy v. St. Louis R. Co.*, 43 Mo. App. 1.

To the same effect as the principal case, *Fleishman v. Neversink Mountain R. Co.*, 174 Pa. St. 510, 4 Am. & Eng. R. Cas., N. S., 261; *Maschek v. St. Louis R. Co.*, 2 Am. & Eng. R. Cas. 38, 71 Mo. 276.

But the duty of watchfulness rests upon the driver, and proof that the driver, while looking backwards at a car which had just passed, ran over a boy, is evidence of negligence. *Collins v. South Boston R. Co.*, 26 Am. & Eng. R. Cas. 371, 142 Mass. 301. See, also, as to inattentiveness of driver and cases where his attention was diverted, *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543; *Levy v. Dry Dock, etc., R. Co.*, 35 N. Y. St. Rep. (Sup. Ct.) 769, 58 Hun (N. Y.) 610. But *compare* *Boland v. Missouri R. Co.*, 36 Mo. 484, where the child's danger was seen by bystanders who shouted to the driver to stop, but his attention being turned in another direction where he anticipated danger, he did not stop until the child was killed. The company was held not liable. This case was disapproved in *Battishill v. Humphreys*, 64 Mich. 494, 28 Am. & Eng. R. Cas. 597.

McIlhaney v. Southern R. Co.

McILHANEY

v.

SOUTHERN R. CO.

(*Supreme Court of North Carolina, March 16, 1897.*)

Railroads in Streets—Injury to Pedestrian—Negligence.—A person walking for his own convenience on a railroad track in a street, which was filled by tracks and with the risks of which he was familiar, saw an engine approaching, and stepped off that track and went upon another, not stopping in the intervening space which was used by the public, as he desired to avoid the steam escaping from the engine, and was struck and injured by a box car, which he saw and believed to be still, backing along the second track. *Held*, that the plaintiff was guilty of negligence, if he would have been safe in the intervening space.

APPEAL from Mecklenburg county superior court.
Error.

G. F. Bason and J. W. Keerans, for appellant.
Burwell, Walker & Cansler, for appellee.

MONTGOMERY, J. That section of A street in Charlotte, between Fifth and Trade streets, is entirely occupied by two tracks of the defendant company and two tracks of the Seaboard Air-Line Railroad Company, with spaces of from five to seven feet between the tracks. The spaces between the tracks were paved with coal dust, and afforded a good walking way,—one better than the sidewalks. The tracks were used by the respective railroad corporations for receiving their trains, shifting their cars, and other similar purposes. The freight depot was there also. The night on which the plaintiff was injured was a dark one; so dark that the cross-ties could not be seen. It was raining, and there were no lights on the street. For his own convenience, he was walking upon one of the tracks of the Seaboard Air Line, and, seeing an engine

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just in front, stepped off, and upon the space between the tracks which he had left and the defendant's track. The engine was exhausting steam, and the plaintiff, to escape injury from that source, got upon the track of the defendant. Instantly, almost, he was knocked off the track, and his leg broken, by the rear box car of a train moving backwards, at the rate of between two and four miles an hour. He testified that when he got upon the defendant's track, and, looking, saw, about 15 feet off, the box car, there was no light on the car, and no bell being rung, and that he could not tell whether the car was moving or not. The defendant introduced testimony going to show that there was a watchman on the lookout, with a light, at the end of the car. The following issues were submitted to the jury: (1) Was plaintiff injured by defendant's negligence, as alleged? (2) Did plaintiff, by his own negligence, contribute to his injury, as alleged in the complaint? (3) If plaintiff, by his own negligence, contributed to his own injury, could defendant, by the exercise of ordinary care, and notwithstanding plaintiff's negligence, have prevented the injury to plaintiff? (4) What are plaintiff's damages? The case, as appears from the record, was well tried, and the charge was very full and clear and able. But we are of the opinion that a new trial must be had, because of the failure of his honor to give an instruction prayed by the defendant, which is in these words: "If the jury believe that plaintiff would have been safe if, after stepping from the Seaboard track, he had stopped in the space between that track and the defendant's track, it was negligence for him to go further, and place himself on defendant's track, and the answer to the second issue should be 'Yes.'" The plaintiff was acquainted with the surroundings at the section of A street where he was hurt, and he knew for what purposes the four railroad tracks on that street were used. Although the public were accustomed to use the street and the tracks for walking ways, yet the plaintiff must have

known that such use was at all times attended with some risk. And this risk was necessarily increased with the darkness of night. The use to which this street was put was a standing warning to pedestrians to be most careful when they undertook to walk through it. By plaintiff's own testimony it was so dark that he could not tell whether a box car 15 feet off was moving or not, although he says that he stopped and looked at it particularly, before he went forward. It was early in the night, being about 8 o'clock, and he had seen at least one engine and train and hands at work, and might have reasonably supposed that the usual work of the railroad would continue for some time. When, under these circumstances, the plaintiff left the safe walking way where he was,—a place prepared by the defendant, and where no harm could have come to him had he continued in it,—the night being dark and it raining, with no lights on the street, and put himself on the defendant's track, he was negligent, and contributed to his own injury. This is not the case of one attempting to pass at a railroad crossing in a city. If a person should approach a crossing in the nighttime, and, after looking and listening, should see a moving train or car upon the track, apparently at a standstill, without a light on the end, or without the engineer or watchman making some other sufficient signal, he, without culpability, might attempt the crossing, and, if injured by the train, he would be entitled to recover damages for the injury. *Mayes v. Railway Co.*, 119 N. Car. 758; *Maginnis v. Railroad Co.*, 52 N. Y. 215. But it must be borne in mind that the place where the plaintiff was injured was not a crossing, but upon a street filled up with four railroad tracks, and constantly used for railroad purposes. The facts concerning plaintiff's conduct were undisputed, and we think but a single inference could be drawn from them by fair-minded men, and that is that a prudent man would not have acted as the plaintiff did on the occasion of his injury. The jury found the de-

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fendant to be negligent, and the plaintiff not guilty of contributory negligence, and, under instructions from his honor, did not consider the third issue. In the next trial it may be necessary for the jury to consider that issue, if the testimony is unchanged. Error. New trial.

WARNER

v.

TEXAS & P. R. Co.*

(164 U. S. 418.)

Oral Contract—Statute of Frauds.—It was verbally agreed between an individual and a railway company that, if the former would furnish the ties and grade the ground for a switch, the railway company would put down the iron rails and maintain the switch for his benefit for shipping purposes as long as he needed it. *Held*, that such agreement is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof."

Same—Grant of Easement.—Such agreement was not, in the meaning of the Texas statute of frauds, a grant or conveyance by the railway company of an estate of inheritance, and for a term of more than one year, in lands.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit.

This was an action brought May 9, 1892, by Warner against the Texas & Pacific Railway Company, a corporation created by the laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that, if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant

Case Stated.

*See notes at end of case.

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pleaded that the contract was oral, and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands."

At the trial, the plaintiff, being called as witness in his own behalf, testified that prior to the year 1874 he had been engaged in the lumbering and milling business in Iowa and in Arkansas, and, in contemplation of breaking up and consolidating his business, came to Texas, and selected a point, afterwards known as "Warner's Switch," as a suitable location, provided he could obtain transportation facilities; that he found at that point an abundance of fine pine timber, and, three miles back from the railroad, a stream, known as "Big Sandy Creek," peculiarly adapted to floating logs, and lined for many miles above with pine timber; that in 1874 the defendant's agent, after conversing with him about his experience in the lumber business, the capacity of his mill, and the amount of lumber accessible from the proposed location, made an oral contract with him, by which it was agreed that, if he would furnish the ties and grade the ground for the switch, the defendant would put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes, as long as he needed it; that the plaintiff immediately graded the ground for the switch, and got out and put down the ties, and the defendant put down the iron rails, and established the switch; and that the plaintiff, on the faith of the continuance of transportation facilities at the switch, put up a large sawmill, bought many thousand acres of land and timber rights and the water privileges of Big Sandy creek, made a tram road three miles long from the switch to the creek, and otherwise expended large sums of money, and sawed and shipped large quantities of lumber, until the defendant, on May 19, 1887, while its road was operated by receivers, tore up the switch and ties, and destroyed his transportation facilities, leaving his lands and other property without

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any connection with the railroad. His testimony also tended to prove that he had thereby been injured to the amount of more than \$50,000, for which the defendant was liable, if the contract sued on was not within the statute of frauds.

On cross-examination, the plaintiff testified that when he made the contract he expected to engage in the manufacture of lumber at this place for more than one year, and to stay there, and to have a site for lumber there, as long as he lived ; and that he told the defendant's agent, in the conversation between them at the time of making the contract, that there was lumber enough in sight on the railroad to run a mill for 10 years, and by moving back to the creek there would be enough to run a mill for 20 years longer.

No other testimony being offered by either party bearing upon the question whether the contract sued on was within the statute of frauds, the circuit court, against the plaintiff's objection and exception, ruled that the contract was within the statute, instructed the jury to find a verdict for the defendant, and rendered judgment thereon, which was affirmed by the circuit court of appeals, upon the ground that the contract was within the statute of frauds, as one not to be performed within a year. *Warner v. Texas, etc.*, R. Co., 13 U. S. App. 236. The plaintiff sued out this writ of error.

Horace Chilton, for plaintiff in error.

John F. Dillon, for defendant in error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The statute of frauds of the state of Texas, re-enacting, in this particular, the English statute of 29 Car. II. c. 3, § 4 (1677), provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person by him there-

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unto lawfully authorized." Tex. St. Jan. 18, 1840 ; 1 Pasch. Dig. (4th Ed.) art. 3875 : Rev. St. 1879, art. 2464 ; Bason v. Hugbart, 2 Tex. 476, 480.

This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom come before this court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England, and of the several states.

In the earliest reported case in England upon this clause of the statute regard seems to have been had to the time of actual performance in deciding that an oral agreement that, if the plaintiff would procure a marriage between the defendant and a certain lady, the defendant would pay him 50 guineas, was not within the statute ; LORD HOLT saying : " Though the promise depends upon a contingent, the which may not happen in a long time, yet, if the contingent happen within a year, the action shall be maintainable, and is not within the statute." *Framcam v. Foster*, Skin. 326 ; *Id.*, Holt 25.

A year later, another case before LORD HOLT presented the question whether the words, " agreement not to be performed within one year," should be construed as meaning every agreement which need not be performed within the year, or as meaning only an agreement which could not be performed within the year, and thus, according as the one or the other construction should be adopted, including or excluding an agreement which might or might not be performed within the year, without regard to the time of actual performance. The latter was decided to be the true construction.

That was an action upon an oral agreement, by which the defendant promised, for one guinea paid, to pay the plaintiff so many at the day of his marriage ; and the marriage did not happen within the year. The case was considered by all the judges. LORD HOLT " was of opinion that it ought to have

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been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." But the great majority of the judges were of opinion that the statute included those agreements only that were impossible to be performed within the year, and that the case was not within the statute, because the marriage might have happened within a year after the agreement; and laid down this rule: "Where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary." *Peter v. Compton*, Skin. 353; *Id.*, Holt, 326, cited by LORD HOLT in *Smith v. Westall*, 1 Ld. Raym. 316, 317. *Anonymous*, Comyn, Rep. 49, 50; Comb. 463.

Accordingly, about the same time, all the judges held that a promise to pay so much money upon the return of a certain ship, which ship happened not to return within two years after the promise made, was not within the statute, "for that by possibility the ship might have returned within a year; and although by accident it happened not to return so soon, yet, they said, that clause of the statute extends only to such promises where, by the express appointment of the party, the thing is not to be performed within a year." *Anonymous*, 1 Salk. 280.

Again, in a case in the king's bench in 1762, an agreement to leave money by will was held not to be within the statute, although uncertain as to the time of performance. LORD MANSFIELD said that the law was settled by the earlier cases. MR. JUSTICE DENISON said: "The statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only may be performed within the year; and

the act cannot be extended further than the words of it." And MR. JUSTICE WILMOT said that the rule laid down in 1 Salk. 280, above quoted, was the true rule. *Fenton v. Emblers*, 3 Burr. 1278; *Id.*, 1 W. Bl. 353.

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several states of the Union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. *Tucker v. Oxley*, 5 Cranch, (U. S.) 34, 42; *Pennock v. Dialogue*, 2 Pet. (U. S.) 1, 18; *McDonald v. Hovey*, 110 U. S. 619, 628. And the rule established in England by those decisions has ever since been generally recognized in England and America, although it may, in a few instances, have been warped or misapplied.

The decision in *Boydell v. Drummond*, 11 East, 142, which has been sometimes supposed to have modified the rule, was really in exact accordance with it. In that case the declaration alleged that the Boydells had proposed to publish by subscription a series of large prints from some of the scenes of Shakespeare's plays in eighteen numbers containing four plates each, at the price of three guineas a number, payable as each was issued, and one number, at least, to be annually published after the delivery of the first; and that the defendant became a subscriber for one set of prints, and accepted and paid for two numbers, but refused to accept or pay for the rest. The first prospectus issued by the publishers stated certain conditions, in substance

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as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. A second prospectus stated that one number, at least, should be published annually, and the proprietors were confident that they should be enabled to produce two numbers within the course of every year. The book in which the defendant subscribed his name had only, for its title, "Shakespeare Subscribers. Their signatures," without any reference to either prospectus. The contract was held to be within the statute of frauds, as one not to be performed within a year, because, as was demonstrated in concurring opinions of LORD ELLENBOROUGH and JUSTICES GROSE, LE BLANC, and BAYLEY, the contract, according to the understanding and contemplation of the parties, as manifested by the terms of the contract, was not to be fully performed (by the completion of the whole work) within the year; and consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the contract, and could not have entitled the publishers to demand immediate payment of the whole subscription.

In *Wells v. Horton*, 4 Bing. 40; *Id.*, 12 Moore C. P. 177,—it was held to be settled by the earlier authorities that an agreement by which a debtor, in consideration of his creditor's agreeing to forbear to sue him during his lifetime, promised that his executor should pay the amount of the debt, was not within the statute; and CHIEF JUSTICE BEST said: "The present case is clearly distinguishable from *Boydell v. Drummond*, where, upon the face of the agreement, it appeared that the contract was not to be executed within a year."

In *Souch v. Strawbridge*, 2 C. B. 808, a contract to support a child, for a guinea a month, as long as the child's father should think proper, was held not to be within the statute, which, as CHIEF JUSTICE TINDAL said, "speaks of 'any agreement that is not to be performed within the space of one year from the making thereof;' pointing to contracts the complete perform-

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ance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell v. Drummond*, the rule to be extracted from which is that, when the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."

In *Murphy v. O'Sullivan*, 11 Ir. Jur. N. S. 111, the court of exchequer chamber in Ireland, in a series of careful opinions by MR. JUSTICE O'HAGAN (afterwards Lord Chancellor of Ireland), BARON FITZGERALD, CHIEF BARON PIGOT, and CHIEF JUSTICE MONAHAN, reviewing the English cases, held that under the Irish statute of frauds of 7 Wm. III, c. 12 (which followed in this respect the words of the English statute), an agreement to maintain and clothe a man during his life was not required to be in writing.

In the recent case of *McGregor v. McGregor*, 21 Q. B. Div. 424, the English court of appeal held that a lawful agreement made between husband and wife, in compromise of legal proceedings, by which they agreed to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and she agreeing to maintain herself and her children, and to indemnify him against any debts contracted by her, was not within the statute. LORD ESHER, M. R., thought the true doctrine on the subject was that laid down by CHIEF JUSTICE TINDAL in the passage above quoted from *Souch v. Strawbridge*. LORD JUSTICE LINDLEY said: "The provisions of the statute have been construed in a series of decisions from which we cannot depart. The effect of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply." LORD JUSTICE BOWEN said: "There has been a decision which for 200 years has been accepted as the leading case on the subject. In *Peter v. Compton*, it was held that 'an agreement that is not to

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be performed within the space of a year from the making thereof' means in the statute of frauds, an agreement which appears from its terms to be incapable of performance within the year." And each of the three judges took occasion to express approval of the decision in *Murphy v. O'Sullivan*, above cited, and to disapprove the opposing decision of *HAWKINS, J.*, in *Davey v. Shannon*, 4 Exch. Div. 81.

The cases on this subject in the courts of the several states are generally in accord with the English cases above cited. They are so numerous, and have been so fully collected in *Browne on the Statute of Frauds* (5th Ed. c. 13), that we shall refer to but few of them, beyond those cited by counsel in the case at bar.

In *Peters v. Westborough*, 19 Pick. 364, an agreement to support a girl 12 years old until she was 18 was held not to be within the statute. *MR. JUSTICE WILDE*, in delivering judgment, after quoting *Peter v. Compton*, *Fenton v. Emblers*, and *Boydell v. Drummond*, above cited, said: "From these authorities it appears to be settled that, in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend upon any contingency. And this, we think, is the clear meaning of the statute. In the present case, the performance of the plaintiff's agreement with the child's father depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute when, by the happening of any contingency, it might be performed within a year."

In many other states, agreements to support a person for life have been held not to be within the statute. *Browne*, St. Frauds, c. 13, § 276. The decision of the

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supreme court of Tennessee in *Deaton v. Coal Co.*, 12 Heisk. (Tenn.) 650, cited by the defendant in error, is opposed to the weight of authority.

In *Roberts v. Rockbottom Co.*, 7 Met. (Mass.) 46, CHIEF JUSTICE SHAW declared the settled rule to be that, "when the contract may, by its terms, be fully performed within the year, it is not void by the statute of frauds, although in some contingencies it may extend beyond a year"; and stated the case then before the court as follows: "The contract between the plaintiff and the company was that they should employ him, and that he should serve them, upon the terms agreed on, five years, or so long as Leforest should continue their agent. This is a contract which might have been fully performed within the year. The legal effect is the same as if it were expressed as an agreement to serve the company so long as Leforest should continue to be their agent, not exceeding five years; though the latter expression shows a little more clearly that the contract might end within a year, if Leforest should quit the agency within that time."

In *Blanding v. Sargent*, 33 N. H. 239, the court stated the rule, as established by the authorities elsewhere, and, therefore, properly to be considered as adopted by the legislature of New Hampshire when re-enacting the statute, to be that "the statute does not apply to any contract, unless by its express terms or by reasonable construction it is not to be performed—that is, incapable in any event of being performed—within one year from the time it is made"; and that "if, by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary"; and, therefore, that an agreement by a physician to sell out to another physician his business in a certain town, and to do no more business there, in consideration of a certain sum to be paid in five years, was not within the

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statute, because, "if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed." The decisions in other states are to the same effect. *Browne, St. Frauds, c. 13, § 277.*

In *Hinckley v. Southgate*, 11 Vt. 428, cited by the defendant in error, the contract held to be within the statute of frauds was in express terms to carry on a mill for a year from a future day; and the suggestion in the opinion that, if the time of performance depends upon a contingency, the test is whether the contingency will probably happen, or may reasonably be expected to happen, within the year, was not necessary to the decision of the case, and cannot stand with the other authorities. *Browne, St. Frauds, c. 13, § 279.*

In *Linscott v. McIntire*, 15 Me. 201, also cited by the defendant in error, an agreement to sell a farm at the best advantage, and to pay to the plaintiff any sum remaining after refunding the defendant's advances and paying him for his trouble, was held not to be within the statute of frauds; CHIEF JUSTICE WESTON saying: "The sale did not happen to be made until a year had expired, but it might have taken place at an earlier period, and there is nothing in the case from which it appears that, in the contemplation of the parties at the time, it was to be delayed beyond a year. This clause of the statute has been limited to cases where, by the express terms of the agreement, the contract was not to be performed within the space of a year. And it has been held to be no objection that it depended on a contingency, which might not and did not happen until after that time."

In *Herrin v. Butters*, 20 Me. 119, likewise cited by the defendant in error, the contract held to be within the statute could not possibly have been performed within the year, for it was to clear eleven acres in three years; one acre to be seeded down the present spring, one acre the next spring, and one acre the spring following; and to receive in consideration thereof all the

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proceeds of the land, except the two acres first seeded down.

In *Broadwell v. Getman*, 2 Den. (N. Y.) 87, the supreme court of New York stated the rule thus: "Agreements which may be completed within one year are not within the statute. It extends to such only as by their express terms are not to be, and cannot be, carried into full execution until after the expiration of that time." The contract there sued on was an agreement made in January, 1841, by which the defendant agreed to clear a piece of woodland for the plaintiff, and to partly make a fence at one end of it, which the plaintiff was to complete, the whole to be done by the spring of 1842; and the defendant was to have for his compensation the wood and timber, except that used for the fence, and also the crop to be put in by him in the spring of 1842. The court well said: "As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute; and, not being in writing, and signed, was void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute."

In *Pitkin v. Railroad Co.*, 2 Barb. Ch. (N. Y.) 221, cited by the defendant in error, a bill in equity to compel a railroad company to perform an agreement to maintain a permanent turnout track and stopping place for its freight trains and passenger cars in the neighborhood of the plaintiff's property was dismissed by Chancellor Walworth upon several grounds, the last of which was that, as a mere executory agreement to continue to stop with its cars at that place, "as a permanent arrangement," the agreement was within the statute of frauds, because, from its nature and terms, it was not to be performed by the company within one year from the making thereof.

In *Kent v. Kent*, 62 N. Y. 560, an agreement by which a father, in consideration of his son's agreeing to work for him upon his farm, without specifying any time for the service, agreed that the value of the work

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should be paid out of his estate after his death, which did not in fact happen until 20 years after the son ceased work, was not within the statute. JUDGE ALLEN, delivering the judgment of the court of appeals, said: "The statute, as interpreted by courts, does not include agreements which may or may not be performed within one year from the making, but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. If the agreement may, consistently with its terms, be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute."

In *Saunders v. Kasterbine*, 6 B. Mon. (Ky.) 17, cited by the defendant in error, the contract proved, as stated in the opinion of the court, was to execute a bill of sale of a slave when the purchaser had paid the price of \$400, in monthly installments of from \$4 to \$8 each, which would necessarily postpone performance by either party beyond the year.

In *Railway Co. v. Whitley*, 54 Ark. 199, a contract by which a railway company, in consideration of being permitted to build its road over a man's land, agreed to construct and maintain cattle guards on each side of the road, was held not to be within the statute, because it was contingent upon the continuance of the use of the land for a railroad, which might have ceased within a year. And a like decision was made in *Sweet v. Lumber Co.*, 56 Ark. 629, upon facts almost exactly like those in the case at bar.

The construction and application of this clause of the statute of frauds first came before this court at December term, 1866, in *Packet Co. v. Sickles*, 5 Wall. 580, which arose in the District of Columbia under the statute of 29 Car. II. c. 3 § 4, in force in the state of Maryland and in the District of Columbia. Alex. Br. St. Md. 509; *Ellicott v. Peterson*, 13 Md. 476, 487; Comp. St. D. C. c. 23, § 7.

That was an action upon an oral contract, by which a

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steamboat company agreed to attach a patented contrivance, known as the "Sickles Cut-Off," to one of its steamboats, and, if it should effect a saving in the consumption of fuel, to use it on that boat during the continuance of the patent, if the boat should last so long; and to pay the plaintiffs weekly, for the use of the cut-off, three-fourths of the value of the fuel saved, to be ascertained in a specified manner. At the date of the contract the patent had 12 years to run. The court, in an opinion delivered by MR. JUSTICE NELSON, held the contract to be within the statute, and said: "The substance of the contract is that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long." "It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time." 5 Wall. 594-596. And reference was made to *Birch v. Liverpool*, 9 B. & C. 392, and *Dobson v. Collis*, 1 H. & N. 81, in each of which the agreement was for the hire of a thing, or of a person, 'for a term specified of more than a year, determinable by notice within the year, and, therefore, within the statute, because it was not to be performed within a year, although it was defeasible within that period.

In *Packet Co. v. Sickles* it appears to have been assumed, almost without discussion, that the contract, according to its true construction, was not to be performed in less than 12 years, but defeasible by an event which might or might not happen within that time. It may well be doubted whether that view can be reconciled with the terms of the contract itself, or with the general current of the authorities. The contract, as stated in the forepart of the opinion, was to use and pay for the cut-off upon the boat "during the continuance of the said patent, if the said boat should last so long." 5 Wall. 581, 594. The terms "during the continuance of" and "last so long" would seem to be pre-

cisely equivalent, and the full performance of the contract to be limited alike by the life of the patent and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat so long as she shall last can be distinguished in principle from a contract to support a man so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds.

At October term, 1877, this court, speaking by MR. JUSTICE MILLER, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." And it was therefore held, in one case, that a contract by the owner of a valuable estate, employing lawyers to avoid a lease thereof, and to recover the property, and promising to pay them a certain sum out of the proceeds of the land when recovered and sold, was not within the statute, because all this might have been done within a year; and, in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the state had agreed to complete by September 1, 1871, was not within the statute, because the contractor, by pushing the work, might have fully completed it before November, 1870. *McPherson v. Cox*, 96 U. S. 404, 416, 417; *Walker v. Johnson*, Id. 424, 427.

In Texas, where the contract now in question was made, and this action upon it was tried, the decisions of the supreme court of the state are in accord with the current of decisions elsewhere.

In *Thouvenin v. Lea*, 26 Tex. 612, the court said: "An agreement which may or may not be performed

within a year is not required by the statute of frauds to be in writing. It must appear from the agreement itself that it is not to be performed within a year." In that case the owner of land orally agreed to sell it for a certain price, payable in five years. The purchaser agreed to go into possession, and make improvements; and the seller agreed, if there was a failure to complete the contract, to pay for the improvements. The agreement to pay for the improvements was held not to be within the statute; the court saying: "There is nothing from which it can be inferred that the failure to complete the contract (by reducing it to writing, for instance, as was stipulated should be done), or its abandonment, might not occur within a year from the time it was consummated. The purchaser, it is true, was entitled by the agreement to a credit of five years for the payment of the purchase money, if the contract had been reduced to writing. But appellant might have sold to another, or the contract might have been abandoned by the purchaser, at any time; and upon this alone depended appellant's liability for the improvements." See, also, *Thomas v. Hammond*, 47 Tex. 42.

In the very recent case of *Railway Co. v. Wood*, 88 Tex. 191, 195, 196, it was held that an oral agreement by a railroad company to issue to one Wood annually a pass over its road for himself and his family, and to stop its trains at his house, for 10 years, was not within the statute. The court, after reviewing many of the authorities, said: "It seems to be well settled that, where there is a contingency expressed upon the face of the contract, or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not within the statute, though it be clear that it cannot be performed within a year except in the event the contingency happens." "If the contingency is beyond the control of the parties, and one that may, in the usual course of events, happen within the year, whereby the contract will be performed, the law will presume that the parties contemplated its happening,

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whether they mention it in the contract or not. The statute only applies to contracts 'not to be performed within the space of one year from the making thereof.' If the contingency is such that its happening may bring the performance within a year, the contract is not within the terms of the statute; and this is true whether the parties at the time had in mind the happening of the contingency or not. The existence of the contingency in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute. Applying these principles to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and his family. He could not transfer it. In case of his death within the year, the obligation of the company to him would have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member, or all of them, within the year. If the agreement had been to give Wood a pass for life, it would, under the above authorities, not have been within the statute; and we can see no good reason for holding it to be within the statute because his right could not have extended beyond ten years. The happening of the contingency of the death of himself and family within a year would have performed the contract in one case as certainly as in the other."

In the case at bar, the contract between the railroad company and the plaintiff, as testified by the plaintiff himself, who was the only witness upon the point, was that, if he would furnish the ties and grade the ground for the switch at the place where he proposed to erect a sawmill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

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The parties may well have expected that the contract would continue in force for more than one year. It may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which, in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was, but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties, nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it," and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth or in the mind of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the contract is not within the statute of frauds as an "agreement which is not to be performed within the space of

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Notes.

one year from the making thereof."

Nor is it within the other clause of the statute of frauds, relied on in the answer, which requires certain conveyances of real estate to be in writing. The sug-

gestion made in the argument for the defendant in error, that the contract was, in substance, a grant of an easement in real estate, and as such within the statute, overlooks the difference between the English and the Texan statutes in this particular. The existing statutes of Texas, while they substantially follow the English statute of frauds, so far as to require a conveyance of any "estate of inheritance or freehold, or for a term of more than one year, in lands and tenements," as well as "any contract for the sale of real estate, or the lease thereof for a longer term than one year," to be in writing, omit to re-enact the additional words of the English statute, in the clause concerning conveyances, "or any uncertain interest of, in, to, or out of" lands or tenements, and, in the other clause, "or any interest in or concerning them." St. 29 Car. II, c. 3, §§ 1, 4; Rev. St. Tex. 1879, arts. 548, 2464; Pasch. Dig. arts. 997, 3875; *James v. Fulcrod*, 5 Tex. 512, 516; *Stuart v. Baker*, 17 Tex. 417, 420; *Anderson v. Powers*, 59 Tex. 213.

Judgment reversed, and case remanded to the circuit court, with directions to set aside the verdict, and to order a new trial.

NOTES.

Statute of Frauds.—A verbal agreement by a railway company to lay a switch for the use of a mill owner, and to maintain it as long as he may need it, is within the statute of frauds, where it appears that the intention and contemplation of the parties was that it should be used for a number of years. *Warner v. Texas, etc., R. Co.*, 2 U. S. App. 647.

An oral contract granting to a railroad company the right to lay a side-track and to take loose dirt and stone from lands for a number of years, is void under the statute of frauds, but as a license will justify acts done under it. *Cayuga R. Co. v. Niles*, 13 Hun

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(N. Y.) 170.—*Applying* Pitkin v. Long Island R. Co., 2 Barb. Ch. (N. Y.) 221; *Day v. New York C. R. Co.*, 31 Barb. (N. Y.) 548.

An executory agreement between an individual and a railroad company that the latter shall continue to stop with their cars at a particular place adjacent to the property, as a permanent arrangement, is, in substance, the grant of an easement or servitude, binding upon the property of the company, and is an interest in land, which is required by the statute of frauds to be in writing; and such an agreement by parol would also be void by the statute of frauds, as being an agreement not to be performed within one year from the making thereof. Pitkin v. Long Island R. Co., 2 Barb. Ch. (N. Y.) 221.—*Applied* in Jackson v. Philadelphia, etc., R. Co., 4 Del. Ch. 180; *Day v. New York Cent. R. Co.*, 31 Barb. (N. Y.) 548; *Cayuga R. Co. v. Niles*, 13 Hun (N. Y.) 170. *Distinguished* in Talmadge v. Rensselaer, etc., R. Co., 13 Barb. 493.

Same.—Stations.—Where a landowner orally agrees to convey land to a company on condition that it will construct a side track thereon and erect station buildings on adjoining land, evidence that the company erected the station buildings as agreed, constructed the track on part of the land, used the remainder as a roadway and expended several hundred dollars in grading and macadamizing it, warrants the finding that the contract was sufficiently performed to take it out of the statute of frauds. Hays v. Kansas City, etc., R. Co., 108 Mo. 544, 51 Am. & Eng. R. Cas. 425.

The mere fact that depot grounds were donated will not render void a contract for the location of the depot. Harris v. Roberts, 12 Neb. 631.

A deed of land to a railroad company stating the consideration to be a certain number of dollars and another instrument executed at the same time by the landowner reciting that he would do certain acts "in consideration of the purchase of land from me for the location of a town site and the location at a depot of a point between" certain stations—*held*, not to show the entire contract between the landowner and the company, and parol evidence was admissible to show that the consideration of the deed was that defendant should locate a depot on the land conveyed, although neither fraud nor mistake was alleged. Gulf, C. & S. F. R. Co. v. Jones, 51 Am. & Eng. R. Cas. 415, 82 Tex. 156; *quoting* East Line, etc., R. Co. v. Garrett, 52 Tex. 137.

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PARKER

v.

NORFOLK & C. R. CO.

(119 N. Car. 677.)

Overflow of Water—Damage to Land—Statute of Limitations.—An action, brought six years after the cause of action accrued, for damage to land by reason of the construction of the road of a railway company, causing an overflow of surface water on the land, is not barred by the statute of limitations, and the plaintiff may claim either the permanent damage or the damage sustained up to the trial of the action, including that sustained within three years prior to the issuing of the summons.

Same—Measure of Damages.—In such an action the true measure of permanent damage is the difference in the value of the land when the right of action accrued, and what would have been its value had the road been skillfully constructed, and it was error for the court to instruct that if the land had been injured through the negligent construction of the road, the plaintiff was entitled to recover the difference between the value of the land before the road was built and the value after the road was built.

Same—Recovery of Permanent Damages.—If the lands were overflowed and damaged by reason of the diversion of the surface water from its natural outlet, without taking it to an adequate outlet, the plaintiff was entitled to recover permanent damages.

APPEAL from Bertie county superior court. *Reversed.*

The pleadings are as follows :

Complaint: "Henry Parker, plaintiff, complaining of the defendant, the Norfolk & Carolina Railroad Company, alleges: (1) That the defendant, the Norfolk & Carolina Railroad Company, is a corporation duly organized under the laws of North Carolina, as set out in chapter 3 of the Acts of 1889, and is engaged in operating a railroad, carrying both freight and passengers, between Pinner's Point, in Virginia, and Tarboro, in North Carolina. (2) That the plaintiff, Henry Parker, was before January 1, 1887, and has been since that date, the owner of that

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certain tract of land in Bertie county, North Carolina, in Roxobel township, called the 'Arthur Harrell Land,' which he bought of Lam Parker and wife, containing 67 acres, and adjoining James Morris' land, the Axum Peele tract, and others. (3) That said Henry Parker for the past six years planted said land in crops of corn, peas, and other products, and endeavored to cultivate crops on said land, until it was rendered unfit for cultivation by the unlawful, negligent and wrongful act of the defendant. (4) That the defendant, the Norfolk & Carolina Railroad Company, some time about the year 1888, negligently, wrongfully, and unlawfully cut ditches along its right of way on plaintiff's land, for the purpose of draining the water of Long Pond and Flat pocosons, on said land, by means of its side ditches, and also of draining the water which collected in said side ditches. (5) That by reason of the negligent, unlawful, careless, and wrongful cutting of said ditches on said land, it was and is constantly overflowed with great quantities of water, which defendant has diverted from its natural course, and from the way in which it had been accustomed to flow, and thereby emptied the same upon the farm of plaintiff, above described. (6) That by reason of the negligent, wrongful, and unlawful and careless cutting of said ditches, and the negligent and unlawful diverting of the course of said water, the plaintiff's farm has been constantly and repeatedly overflowed for the past six years, and the crops destroyed, and the land rendered unproductive. (7) That by reason of the negligent, wrongful, unlawful, and careless cutting of said ditches, and the negligent and unlawful directing of the course of said water, the plaintiff's farm, by said repeated overflow, has been rendered sour and sobbed, and its fertility destroyed, and rendered unfit for agricultural purposes. (8) That, owing to the acts above alleged, plaintiff has been damaged one thousand dollars. Therefore plaintiff asks judgment—First, for one thousand dollars; second, for all equitable and legal relief; third, for the costs of this action."

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Answer : "The defendant, for answer to the plaintiff's complaint, says : (1) That defendant admits sections Nos. 1 and 2 to be true. (2) That the defendant is informed and believes that section 3 of the complaint is not true, and, therefore, denies the same. (3) That the defendant admits that it cut ditches on its right of way, but alleges that the said ditches were necessary for the proper drainage of its roadbed, and that in cutting the same it exercised a lawful right, in a lawful and proper manner, and denies that they were wrongfully, negligently, or unlawfully cut. (4) That the defendant is informed and believes that section 5 of the complaint is untrue, and alleges that the plaintiff's land described in the complaint has not been overflowed more frequently since than before the construction of its roadbed, and that it has not diverted any water from its natural course, or caused it to flow upon the [land of] plaintiff in greater quantities than it hitherto was wont to do. (5) That the defendant is informed and believes that section 6 of the complaint is not true, and, therefore, denies the same. (6) That the defendant denies sections 7 and 8 of the complaint to be true. Wherefore the defendant demands judgment that it go, without day, and recover the costs of this action."

Amendment to answer : "By leave of the court the defendant amends the answer by adding thereto the following, to wit : (7) That defendant purchased of plaintiff the right of way over the land on which the ditches and drains complained of were constructed, and that said ditches and drains were necessary for the proper construction of defendant's roadbed, and the same were properly and skillfully constructed ; and, if any damage resulted to plaintiff's land in consequence thereof, it was the natural and necessary result of a proper and skillful construction of said roadbed, and plaintiff, in afterwards cultivating said lowlands, was guilty of contributory negligence. (8) That all of the causes of action set out in plaintiff's complaint accrued, if at all, more than three years before this action was commenced, and are barred by the statute of limitation.

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Wherefore defendant demands judgment that it go without day, and recover of the plaintiff the costs of this action."

Issues tendered by defendant: "(1) Is the plaintiff's cause of action barred by the statute of limitation? Answer. No. (2) Were the defendant's roadbed and drains mentioned in complaint skilfully constructed, and the drains necessary and proper for the safety of said roadbed? Answer. Yes. (3) Was plaintiff guilty of contributory negligence in planting corn on his low grounds after the construction of said roadbed and drains? Answer. Yes. (4) Has defendant wrongfully caused the overflow of the plaintiff's land? Answer. Yes. (5) What damage is plaintiff entitled to recover, if any? Answer. \$300."

The judgment is as follows: "This cause, coming on to be heard before BOYKIN, J., and a jury, and, upon the issues submitted, the jury having returned for their verdict as follows: '(4) Has the defendant wrongfully caused the overflow of the plaintiff's land? Answer. Yes. (5) What damage is plaintiff entitled to recover, if any? Answer. \$300,'—and the court having answered the following issues as set out below: '(1) Is the plaintiff's cause of action barred by the statute of limitations? Answer. Yes. (2) Were the defendant's roadbed and drains mentioned in the complaint skilfully constructed, and the drains necessary and proper for the safety of said roadbed? Answer. Yes. (3) Was plaintiff guilty of contributory negligence in planting corn on his lowlands after the construction of said roadbed and drains? Answer. Yes,'—on motion of Francis D. Winston, attorney for Henry Parker, plaintiff, it is ordered, adjudged, and decreed that Henry Parker, plaintiff, recover of the Norfolk & Carolina Railroad, the defendant, the sum of three hundred dollars, and the costs of this action, to be taxed by the clerk of this court. This recovery is for the actual damage to the land itself."

The case on appeal is as follows: "There was evidence tending to show that the railroad runs east and

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west through the lands of the plaintiff. The road is north of the farm. Flat pocoson is east of the *locus in quo*. Long Pond pocoson is west of the *locus in quo*. Plaintiff's farm is between these two pocosons. The railroad crosses both pocosons, running east and west. Flat pocoson naturally drains south. Its waters would not drain over plaintiff's lands, because there is a ridge between plaintiff's land and Flat pocoson. This ridge prevents the waters of Flat pocoson draining on plaintiff's lands, and its waters would not touch plaintiff's lands but for the railroad ditches. Long Pond pocoson naturally drains south, and its waters would not drain over plaintiff's lands, because there is a ridge between Long Pond pocoson and plaintiff's land. The ridge prevents the waters of Long Pond pocoson draining on plaintiff's land, and its waters would not touch plaintiff's land but for the railroad ditches. The natural drain of Flat pocoson is into Wartom pocoson, and its waters empty into that pocoson more than a mile below plaintiff's farm, and south of it. The natural drain of the waters of the Long Pond pocoson is into Cashie swamp. By reason of ditches cut along the line of the defendant's roadbed, the waters of Flat pocoson are drained on plaintiff's land from the east by said ditches, and the waters of Long Pond pocoson are drained on his land from the west by said ditches. The plaintiff's lands are drained. Before the cutting of the railroad ditches the land was in a good state of cultivation, yielding eight barrels of corn to the acre, and did not overflow. Since the ditches were cut, and the overflow caused by them, the yield has been some years one barrel to the acre, and some years nothing, the whole crop being destroyed. Formerly only the waters of Wartom pocoson drained over the land, but plaintiff cut a large canal in 1873 that carried off those waters. He never lost as much as a barrel of corn after the canal was cut, until the overflowing complained of. Fifteen acres in cultivation, seven more cleared, which he abandoned after the overflowing commenced. Corn has averaged \$3 per barrel since defendant cut ditches.

The land is now sobbed and soured by reason of the overflows. Plaintiff's loss was an average of forty barrels of corn a year. The land was worth \$25 per acre before the overflowing. It is worth nothing now. The defendant cut down two feet ten inches across the ridge between plaintiff and Flat pocoson, and the same depth as to the ridge between the land and Long Pond pocoson. The drainage is done by reason of the draining of water on it that naturally flowed from it. The ditches cut along the roadbed of the defendant are necessary for the safety of the roadbed, and are skillfully cut. The plaintiff's land has suffered each year since 1888, when the road was built. This action was commenced October 19, 1894. The water comes down quickly, and stays long. Sometimes plaintiff cannot get from one part of his farm to the other. The plaintiff, before the cutting of the railroad ditches, deeded to the defendant a right of way across his land. The plaintiff does not own Long pocoson nor Flat Swamp pocoson, and neither touches his land. It is admitted that, before the drain ditches were cut, the plaintiff conveyed to the defendant a right of way across his farm. The defendant, in writing, and in apt time, asked the following special prayers, to wit: '(1) That it being admitted that defendant purchased its right of way from the plaintiff, along which the drains complained of are constructed, if the jury shall find that said drains were necessary for the safe and proper construction of its roadbed, and further that said drains were constructed in a skillful and proper manner, then any damage resulting from the construction of said drain must be borne by the plaintiff, and consequently he is not entitled to recover any damage therefor.' This instruction was refused, and defendant excepted. '(2) That if the jury believe the testimony of the plaintiff, to the effect that the construction of said roadbed and drains had rendered said land totally unfit for cultivation, then the plaintiff must recover the damage done to said land in one action, which action accrued to plaintiff when the roadbed and drains were first constructed;

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and, if the jury believe the evidence, it should find that plaintiff's cause of action is barred by the statute of limitation.' This instruction was refused, and defendant excepted. The court instructed the jury that plaintiff could not recover anything for damage to crops, but that plaintiff was entitled to recover the difference between the value of the land before the road was built, and the value after the road was built, provided that the jury should further find that the railroad company wrongfully and negligently, by its side ditches, drained and diverted from their natural courses the waters of Flat pocoson and Long Pond pocoson into Wartom swamp, and by that means overflowed and damaged the *locus in quo*. To this instruction the defendant excepted. The court instructed the jury that, if they believed the evidence, the plaintiff's cause of action was not barred by the statute of limitation. To this instruction the defendant excepted. The jury rendered a verdict as appears of record. The defendant moved for a *venire de novo*. Motion overruled, and defendant excepted. Defendant then moved for a judgment upon the verdict. This motion was overruled, and defendant excepted."

John L. Bridgers and Martin & Peebles, for appellant.

Francis D. Winston, for appellee.

EVERY, J. There was no error in the ruling of the court that the plaintiff's right of action was not barred by the statute of limitations. The plaintiff had no cause of action if the defendant's ditches and drains were constructed skillfully, and with a due regard for the rights of the owners of adjacent lands. *Adams v. Railroad Co.*, 110 N. Car. 325, 52 Am. & Eng. R. Cas. 676; *Ridley v. Railroad Co.*, 118 N. Car. 998. It could only acquire the prescriptive right to pond water on the plaintiff's land by subjecting itself to an action for the injury continuously for 20 years. *Emery v. Railroad Co.*, 102 N. Car. 232, 37 Am. & Eng. R. Cas. 253;

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Sherlock v. Railway Co., 115 Ind. 22; 1 Wood, Lim. Act. p. 466, § 182. Until, by acquiescence in such continuous occupation for 20 years, the prescription of a grant arises, an action will always lie for damage. The plaintiff may elect to claim only the damage sustained up to the trial of the action, and, if the defendant fail to ask in his answer for the assessment of prospective as well as present damages, the bar of the statute will not prevent a recovery for that sustained within three years prior to the issuing of the summons. Sherrill v. Connor, 107 N. Car. 638; 1 Wood, Nuis. § 180. If, however, the plaintiff fail to declare for permanent damage, the defendant, at his option, may demand that the assessment shall extend to prospective injury, or, by silence, acquiesce in the finding only of what may have accrued up to the time of trial. Ridley's Case, *supra*. The right of action accrues in such cases when the first injury is sustained (Ridley's Case, 118 N. Car. 1010), and cannot be defeated by pleading the statute, except by showing 20 years' continuous user (Emery v. Railroad Co., *supra*).

It being manifest that the statute of limitation was in no aspect of the testimony an available defense, the next question that arises is whether the judge erred in his instruction as to the measure of damages. He told the jury, in substance, that if the defendant, in constructing its roadbed, had negligently diverted the waters of Flat pocoson and Long Pond pocoson from their natural outlets, and by that means had caused the overflow complained of, the plaintiff would be entitled, in any aspect of the evidence, to recover the difference between the value of the land "before the road was built, and the value after the road was built." The plaintiff had complained that "by reason of the negligent, wrongful, unlawful, and careless cutting of said ditches, and the negligent and unlawful diverting of the course of said water, the plaintiff's farm, by said repeated overflows, has been rendered sour and sobbed, and its fertility destroyed, and rendered unfit for agricultural pur-

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poses." It is a well-settled principle of pleading, under our Code system, that the right to a particular kind of relief depends, not upon the specific demand for it in the prayer, but upon the facts alleged in the complaint or counterclaim, and proved upon the trial. The allegation of facts that entitle a party to affirmative relief, under our liberal system of pleading, is equivalent to a formal demand for such relief, or a general prayer that would have been embraced under the rules of practice in courts of equity. *Stokes v. Taylor*, 104 N. Car. 394; *Harris v. Sneed*, 104 N. Car. 369; *Roberson v. Morgan*, 118 N. Car. 994; *Holden v. Warren*, 118 N. Car. 327. Under the rule laid down in these authorities, it was not error to hold that the allegation that the fertility of plaintiff's land was destroyed, and that it was rendered wholly unfit for agricultural purposes, should be construed as a demand for permanent damages, and constituted notice to the defendant to meet the proof that might be offered to establish the truth of the claim. The defendant had requested the court to instruct the jury that, if the plaintiff had shown that the land was rendered unfit for cultivation, the plaintiff could recover only permanent damage, and that the right of action accrued when the road was first constructed, and was therefore barred.

While the judge correctly held that the assessment should embrace past as well as prospective injury, he was in error when he told the jury that the plaintiff was entitled to recover for all of the diminution in the value of the land caused by the construction of the road, ignoring the fact that compensation had already been made, in the purchase of the right of way, for any damage that would result from draining the road-bed and cutting proper drains, provided ordinary care was exercised in doing the work. *Fleming v. Railroad Co.*, 115 N. Car. 676. The true measure of permanent damage, as held in *Ridley v. Railroad Co.*, 118 N. Car. 1009, "was the difference in the value of plaintiff's land in its condition when the right of ac-

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tion accrued and what would have been its value had the road been skillfully constructed." For the misdirection of the jury as to the measure of damages, there must be a new trial.

But we deem it best to pass upon the only remaining assignment of error, since the same question will almost certainly be again raised in the court below. The authority to divert surface water from a drain through which it previously made its way to its natural outlet, with the proviso that it is carried in the side ditches either directly to its natural outlet, or to a natural outlet capable of receiving it, is included in the easement acquired by the unrestricted grant or condemnation of the right of way. *Fleming v. Railroad Co.*, 115 N. Car., at pages 693, 698; *Station v. Railroad Co.*, 109 N. Car. 337; *Gould, Waters*, § 273. A railroad company enjoys, as to its right of way, the same privilege as any other landowner, and is subject to the same restrictions and qualifications in carrying off or diverting accumulations of surface water. *Jenkins v. Railroad Co.*, 110 N. Car. 438. It follows that there is no merit in the exception to that portion of the charge relating to the diversion of surface water by the negligent and unskillful cutting of side ditches.

If the lands of the plaintiff were overflowed and damaged by reason of such diversion of surface water from its natural outlet, without taking it to an adequate outlet, he was entitled to recover permanent damages, under the rule already laid down. New trial.

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Permanent Dam-
ages.

Pharr v. Southern R. Co.

PHARR

v.

SOUTHERN R. Co.

(119 N. Car. 751.)

Trespasser on Track—Contributory Negligence—Liability of Railway Company.—Where an engineer, by keeping a reasonable and careful lookout, could have discovered a man who was lying apparently helpless so near the rail of the track as to expose him to danger from the engine as it passed, and could, by the use of the appliances at his command, and without peril to those on his train, have stopped the train in time to have avoided injury to such man, and failed to do so, the railway company was guilty of negligence, and liable for the death of such man notwithstanding his contributory negligence.

APPEAL from Mecklenburg county superior court.
Reversed.

Burwell, Walker & Cansler, for appellant.
Geo. F. Bason, for appellee.

MONTGOMERY, J. The plaintiff's intestate was lying in a position horizontal to the railroad track, with a part of his body resting in a slight depression caused by a small ditch. His head, on or between the sills, could not be seen by engineer and fireman, according to their testimony, and was so near the rail as to be struck by the engine as it passed. From the evidence he was asleep or drunk; probably both. The engineer testified that, as he turned a curve in the road at a point 600 yards distant from the place where the man was killed, he saw the object; that he looked at it carefully, and thought it was a cross-tie. It attracted his attention. His duty then was, more than ever, to have kept a reasonable and proper lookout in his front, in order to discover the nature of the object in time to stop the train, and prevent injury if it should turn out to be a

man or other animal. And yet, as we understand the testimony of both the engineer and the fireman, after a careful reading of it, there was no further lookout until the engine was within 50 or 75 yards from where the man was killed,—too late to stop the train and prevent the injury.

The counsel of the defendant, in his argument here, undertook to distinguish the facts in this case from those in the case of *Pickett v. Railroad Co.*, 117 N. Car. 616, and insisted that the law which was announced there upon the facts did not apply to the facts in this case. It is true that in *Pickett's Case*, *supra*, the man was lying on the track, partly between the rails, asleep; while in this case no part of the body was between the rails. But we think the rule which requires an engineer to keep a reasonable lookout in his front in observing the track applies as fully to the facts in this case as to those in *Pickett's Case*. A railroad company would certainly be liable to passengers if its engineer, by a reasonable and proper lookout, could have seen an object, though not immediately on the track, but on the side, and so near as to obstruct an engine, and cause injury to them, and did not stop his engine in time to prevent it. And it does seem that the same rule would apply, and the company be liable to the next of kin at suit of personal representative, where a man might have been seen lying apparently helpless, and so near to the track as to be killed by a passing engine. We think that this court has so decided in effect, if not directly, in *Deans v. Railroad Co.*, 107 N. Car. 686, 45 Am. & Eng. R. Cas. 45. There the court said: "It is the duty of an engineer while running an engine to keep a careful lookout along the track, in order to avoid or avert danger in case he shall observe any obstruction in his front." The position of the man as to the railroad track in that case was on the side of the track. A witness testified that "he could not tell from his position whether he was lying across the rail, but thought his head was on the road-bed beyond the ends of the cross-ties." We are, there-

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fore, of the opinion that his honor was in error when he instructed the jury that if they believed the testimony of the witnesses, and found the facts to be as testified by them, the plaintiff could not recover, and that they should find the issues for the defendant. He should, upon the issues submitted, have instructed the jury that the plaintiff had contributed to his own injury. The testimony on that point was uncontradicted. In fact, the contributory negligence was admitted. He should then have instructed the jury as to the third issue (which was in these words, "Notwithstanding the negligence of said intestate, did the defendant's agents exercise ordinary and reasonable care to prevent the injury?") that if from the evidence, it clearly appearing that two inferences might be drawn therefrom by fair-minded men, they should find "that the engineer, by keeping a reasonable and careful lookout, could have discovered the object which he said he thought was a cross-tie was a man lying apparently helpless so near the rail of the track as to expose him to danger from the passing engine, or when he first discovered, or by the exercise of ordinary care and diligence could have discovered, that it was a man, he could, by the use of the appliances at his command, and without peril to those on his train, have stopped the train in time to have avoided the injury to the plaintiff's intestate, the defendant was guilty of negligence, notwithstanding the plaintiff's intestate was careless in lying down near the track, and the jury will answer the first issue 'Yes,' and the third issue 'Yes.'"

As the plaintiff is entitled to a new trial, we will not discuss any further the special instructions asked by the counsel of the plaintiff, as they may not arise on the new trial. New trial.

Louisville & N. R. Co. v. Johnson.

LOUISVILLE & N. R. CO.

v.

JOHNSON.

(*Court of Appeals of Kentucky, Nov. 19, 1896.*)

Removal of Trees near Right of Way.—Where the safety of the passengers and employees of a railway company requires the removal of trees standing near the right of way of the railway company, an action will lie for the removal of such trees.

APPEAL from Nelson county circuit court. *Reversed.*

John S. Kelley and H. W. Bruce, for appellant.
Ben Johnson, for appellee.

PRYOR, C. J. This action was instituted by the railroad company for the purpose of having certain trees removed, standing on the lands of the appellee, and near the appellant's right of way. A demurrer was sustained to the petition. If, as the appellant alleges, the trees are so near appellant's roadbed as to endanger the lives of those who are passengers on its trains, from the falling timber during high winds, the trees ought to be removed. The record presents a question of fact, and, if the danger is such from the proximity of the trees to the road that one might reasonably say the safety of passengers and those on the train required their removal, the trees ought to be felled. The averments of the petition are direct and positive that the timber is dead, and so near the road as that those on the train would be in imminent peril from the falling timber caused by high winds or the decay of the trees; and, the statements being admitted to be true by the demurrer, it should have been overruled, and the case heard on its merits. In the case of

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Filbin v. Railway Co., 91 Ky. 444, this same question was disposed of, the court saying that if the danger was probable, and the company aware of that fact, the timber should be removed, whether on the land of the railway company or on the land of another, and, if the company is liable in such a state of case, a remedy should be afforded for abating the danger, and a court of equity should give the relief if, upon the proof, the averments of the petition are sustained. The appellant is offering to pay the expenses of removal, as well as the value of the timber ; and, while the owner should not be deprived of the use of his property unless its condition renders it dangerous to travel, this case should be heard by the chancellor, in order to ascertain whether the complaint of the appellant is sustained by the facts. Reversed, and remanded for proceedings consistent with this opinion.

Parker v. South Carolina & G. Ry. Co.

PARKER

v.

SOUTH CAROLINA & G. RY. CO.

(*Supreme Court of South Carolina, March 1, 1897.*)

Production of Papers—Harmless Error.—In an action against a railway company by an employee to recover for injuries, the court ordered the defendant to deliver to the plaintiff certain papers for his use. The evidence was obtained by the plaintiff, but in another way. *Held*, that the error, if any, in granting such order was harmless.

Injuries to Employee—Damages.*—In such action it is not error to instruct the jury that in estimating the damages sustained by the plaintiff they may take into consideration the amount of the doctor's bill for attending to his injuries, though the bill remained unpaid.

Same—Instructions—Negligence—Burden of Proof.—Where, in such action, the jury has been instructed that it is the plaintiff's duty to show by the preponderance of the evidence that his injuries were caused by the defendant's negligence, it is not error to refuse to instruct that the burden of the proof is on the plaintiff to show negligence on the defendant's part.

Knowledge of Defective Appliances—Contributory Negligence.—A servant is not necessarily guilty of contributory negligence because he remains in the service of his master after he has knowledge of defects in the machinery or appliances with which he is furnished to perform his work, but it is a question of fact for the jury.

*See notes at end of case.

APPEAL from Edgefield county common pleas circuit court. *Affirmed.*

Defendant's requests to charge were as follows :

"(1) The foundation of this action brought by the plaintiff against the South Carolina & Georgia Railroad Company is an allegation of negligence made by the plaintiff against the defendant, in that it is claimed that the plaintiff, while riding upon the engine of the defendant as an employee of the railroad, was injured, because, it is claimed, the engine was thrown from the track by reason of some defects in the said engine, and

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by reason of defects in the track. This being, in substance, the charge made by the plaintiff, the plaintiff must show by the preponderance of evidence that the defendant, its agents and servants, were guilty of negligence in the manner as charged; in other words, the plaintiff must satisfy the jury by the preponderance of evidence that, under the circumstances proven in the case, the defendant has omitted to do what a prudently conducted railway company would have done, or has done what a prudently conducted railroad company would not have done.

“(2) In this charge of negligence brought by the plaintiff against the defendant, the burden of proof of establishing the negligence is upon the plaintiff, and no presumption of negligence arises from the mere fact that the engine jumped from the track, or that the plaintiff was injured. In cases between passengers and a railroad company, when there is an accident, ordinarily there is a presumption of negligence; but in cases between the employees or servants of the railroad company and such railroad no such presumption arises from the occurrence of the accident which caused the injury complained of, and the burden is upon the plaintiff to satisfy the jury that there was negligence. Nitro-Glycerine Case, 15 Wall. (U. S.) 539; Shear. & R. Neg. § 99; Railroad Co. v. Smith (Pa.) 17 Atl. 443.

“(3) That as between passengers and a railroad company, when an injury has happened, the measure of care is extraordinary care, and the company is held liable for the slightest negligence; but not so as between employees (as in this case), and the railroad company, where the measure is only the exercise of ordinary care and diligence.

“(4) Railroad companies do not warrant their employees the safe condition of their line, nor the absolute security of their appliances, machinery, and roadbed. They only guarantee that due care will be used in constructing and keeping them in repair, and due care used in operating the line, appliances and machinery. When the railroad has exercised all of the care and caution

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which a prudent man would take for the safety and protection of his own person, the law does not hold it liable for the consequences of a defect which could not be discovered by careful inspection. Patt. Ry. Acc. Law, § 284.

“(5) In a case like the present one, the proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence, but whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury, nor that the company should have employed any particular means which it may appear, after the accident, would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. *Railway Co. v. Locke*, 112 Ind. 404 ; *Beatty v. Railway Co.*, 58 Iowa 242, 8 Am. & Eng. R. Cas. 210.

“(6) The liability of the railroad to its employees or servants being dependent upon its negligence, it is not liable for injuries to them resulting from inevitable accidents or misfortunes such as could not be averted by diligence in the management of the road. Patt. Ry. Acc. Law, § 282 ; *Railroad Co. v. Filbern*, 6 Bush (Ky.) 574, 99 Am. Dec. 693.

“(7) The jury is charged that if they find from the evidence that the engine of the defendant, upon which the plaintiff was travelling, was well constructed, and in reasonably fair order, and that it was thrown from the track through the culpable act of some person, known or unknown, who maliciously or mischievously placed spikes or other obstructions upon the track by which the engine was derailed without the knowledge of the defendant or its agents and servants who had charge of the track, and without want of care on the part of the defendant or that of its agents in discovering such obstructions in time to remove them, that the plaintiff cannot recover, no matter what may be his

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misfortune in being injured, and the jury must find for the defendant. *Railway Co. v. Kane*, 92 Ga. 187, 59 Am. & Eng. R. Cas. 227.

"(8) The jury is further charged that the plaintiff must introduce evidence to show that the injury is more naturally to be attributed to the negligence of the defendant than any other cause, or he cannot recover. If the accident appears upon the evidence to be as consistent with the absence of negligence for which the defendant is responsible as with the existence of such negligence, the plaintiff must fail, and the verdict must be for the defendant. *Griffin v. Railroad Co.*, 148 Mass. 143, 38 Am. & Eng. R. Cas. 184.

"(9) The testimony must not only establish that the defendant was guilty of negligence, but it must establish that the injury arose from such negligence; in other words, that the injury was proximately caused by the negligence of the defendant company, its agents and servants. *Glenn v. Railroad Co.*, 21 S. Car. 466.

"(10) An employee of a railroad company, in entering into the service thereof, knows, or is taken to know, that there are extraordinary dangers inseparable from such a service, which human care and foresight cannot always guard against. He is not bound to incur these known perils, incident to the service, and may refuse to do so; or he may, as far as can be done, provide for them, in the rate of compensation or otherwise. But if he voluntarily engages to serve in view of all the hazards to which he will be exposed, it is well settled that, as between him and his employer, he undertakes to run all of the ordinary risks of the service; and this includes risk of injuries which may arise from an unexpected cause, and which could not be guarded against by the exercise of ordinary care and diligence; and if the jury in this case find from the evidence that the plaintiff was injured by such an accident, arising from an unexpected cause, which could not be guarded against by the exercise of ordinary care and diligence, he cannot recover. *Railroad Co. v. Elliott*, 1 Coldw.

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(Tenn.) 611, 78 Am. Dec. 509; *Rodman v. Railroad Co.*, 55 Mich. 57, 17 Am. & Eng. R. Cas. 521.

“(11) The employer or the railroad company, as in this case, is not bound to use the safest machinery, or the newest inventions in machinery, or in the keeping up of their roadbed, but if they use machinery that is suitable for the work, and exercise that degree of skill and labor which is ordinarily used in the keeping up of a roadbed, employing proper section masters or inspectors, who properly and carefully discharge their duty, and, notwithstanding such discharge of duty and such exercise of ordinary care and diligence, an injury occurs to an employee, then the railroad company is not responsible in damages, and the verdict must be for the defendant. *Patt. Ry. Acc. Law*, § 285; *Durkin v. Sharp*, 88 N. Y. 225, 8 Am. & Eng. R. Cas. 522.

“(12) It is claimed that the engine was defective in the way as is alleged in the complaint and sought to be proven in the evidence. The jury should first inquire whether or not there was any defect, in any way, in the engine, and then they should inquire whether or not such defect contributed to the accident, or brought it about; and, even if they be satisfied that there was a defect in the engine which contributed or brought about the accident, or, in other words, which caused the engine to mount the track, then they should enter upon the important inquiry whether or not the plaintiff, *Parker*, knew of these defects in the engine, and continued to use the engine with the knowledge of these defects; and the jury is charged that, if they find he had such knowledge, and still continued to use the engine, and from the said defects the injury occurred, the plaintiff cannot recover, and the verdict must be for the defendant. *Hooper's Case*, 21 S. Car. 541; *Evans v. Chamberlain*, 40 S. Car. 109; *Wood, Mast. & S.* §§ 368-376.

“(13) That an employee who works defective machinery, knowing the defect, assumes the risk, and, if injured from such defect, cannot recover, even if his employer knows it. In order to shift the responsibility

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to the employer, he must have promised to repair. In this case the jury is charged that if in February, 1895, Parker delivered the engine No. 6 to Blackwood, the repairing agent of the defendant, and they find he promised to repair it as to the parts claimed to be out of repair and dangerous, yet, if they further find that he did not so do, and Parker again accepted said engine, and in a dangerous condition, known to him, ran it from time to time until June 25, 1895, and that from such condition of said engine he was then injured, he cannot recover, no matter how many times he again notified the agents of the company, unless they again promised to repair. Wood, Mast. & S. § 379."

The charge of the court was as follows:

"Mr. Foreman and Gentlemen of the Jury: It is a matter of congratulation to you that this case, which has consumed nearly three days, is about drawing to a close; and I must say that from the attention that you have given, not only to the evidence, but to the arguments, I am sure that, whatever verdict you arrive at in this case, the litigants will get one which will be the result of your best judgment, as they have the right to expect, and as they do expect, and as the law requires. As the arguments have taken such a range it may be proper for me to call your attention to the issues that you are called upon to decide. Those issues are made up by what is known as the 'pleadings.' The plaintiff comes into court, and alleges his cause of action by what is known as his 'complaint.' The defendant answers, either admitting or denying such allegations of the complaint as he may see proper under the forms of pleadings. The answer can be general or special. The defendant can set up any special defense he may see proper to set up. This is a suit for damages,—a suit brought against the defendant railroad company, alleging that the defendant was negligent in not supplying the plaintiff with a proper locomotive, and also negligent in not keeping the roadbed in good and proper repair, and by reason of these acts of negligence the plaintiff, while running the engine

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as engineer in the employment of the defendant, was thrown down an embankment and injured, as he alleges, in the sum of twenty thousand dollars. The defendant denies negligence, and sets up as an affirmative defense that the plaintiff was injured by no negligent act of the railroad company, by reason of the fact that some one had maliciously and willfully placed a spike or some object upon the railroad track, and that was the cause of the accident; alleges, on the other hand, that, if the plaintiff was injured, it was through no fault of theirs,—no want of proper care on the part of the defendant. Now, you will see at the very outset that the case turns upon the question of negligence. What is negligence? Negligence ordinarily is the want of due and proper care. I charge you that where one enters in the service of a railroad company in the capacity of engineer, for instance, the same rule of negligence does not apply; that same degree of care does not attach to the railroad company as would apply if he were a passenger riding upon the train. As a passenger, the contract is different when he enters upon the train. The contract on the part of the passenger with the railroad is, he pays the company so much to carry him safely to a certain point. But when you enter the service of the railroad the obligation is reciprocal. There are acts required not only of the railroad, but also of the employee; the relation of master and servant existing, the railroad being the master and the employee the servant,—the same thing as employer and employee. Now, their duties are reciprocal. In the first instance, it is the duty of the railroad company to furnish safe and proper machinery; and, secondly, it is their duty to keep the roadbed in ordinary repair, capable of conveying trains that are to run over the road in the usual course of traffic. It is the duty of the employee, the engineer, for instance, to so conduct that engine in a skillful manner as a prudent and skillful engineer would do under the circumstances. If there is any defect in the engine while in the use of the engineer, it becomes a mixed question of

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law and fact how far his duties require him to report the fact, and whether he should undertake to operate that engine knowing it to be in the condition that it is. There are two acts of negligence complained of. One is that the railroad furnished defective machinery, and the other is that it did not keep a proper roadbed. So your inquiry will be whether this accident is attributable to either or both of these causes. Was it the fault of the engineer, or was it because of the want of proper and ordinary care on the part of the railroad company? You will first inquire what machinery was furnished him. I charge you that in the first instance it is the duty of the railroad company to furnish properly equipped machinery; but if in the use of that machinery by the employee it becomes defective, and he knows of that defect, and that defect is such that a prudent engineer—a cautious engineer—would not use under the circumstances, and if the engineer in this case did use that machinery in that fix, knowing it to be defective, and the defect was such as a prudent and cautious engineer would not have used under the circumstances, then I charge you that the plaintiff in this case would assume the liability, and the railroad would not be responsible for an accident occurring to him under those circumstances. To illustrate what I mean, I will give you a hypothetical case: If that engine had a cracked wheel on that morning, and that fact was known to the engineer, and was such that one skilled in engineering, known to be prudent and cautious, would not have used, knowing of that defect, and the engineer, while conscious of this fact, used it in any way, then he would assume the risk. While it is the duty of the railroad to furnish proper machinery, it is also the duty of the employee to use it in a proper and skillful manner. Now, for instance, if it appeared to a prudent engineer that one of the wheels would probably run off of that engine before it would make the trip, and, knowing that fact, he undertakes to run it, and runs it off, under those circumstances he would assume the risk himself.

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"As I have said, it is the duty of the railroad company to furnish proper machinery and a proper track. If you find the machinery was not defective, then your inquiry will be, was the accident due to improper repair of the railroad track? That is a question of fact for you. You have heard the evidence. Was that track in such condition as to reasonably transport over it the engines and cars that were to be used for the ordinary purpose of the traffic of that railroad? You have seen the track; you have heard it described here how it was before the accident. You have heard the witnesses upon that point. Now, was the railroad negligent in keeping up that track? If so, and the accident occurred through negligence of the railroad, then the plaintiff would be entitled to recover. If, on the other hand, they failed to supply him with proper machinery, or failed to put his machinery in proper repair, and the engineer was not careless or reckless in using the machinery, and the accident occurred through the negligence of the railroad in not furnishing proper machinery, under those circumstances the plaintiff would be entitled to recover. Now, the gentlemen who have argued this case have relieved me of a great deal in explaining to you minutely, in detail, the law applicable to the case, which they have collated in their requests to charge, and which they have sent up to me for the purpose of having me pass upon them. 'That it is the duty of the defendant to furnish the plaintiff with a safe and sound engine with which to work, and a safe and sound roadbed; and it was their further duty to keep and maintain said engine and roadbed in a safe and sound condition; and, if the jury find from the evidence that the defendant negligently failed to perform either of these duties as to the engine or roadbed, and if the engine or roadbed was not in a safe or sound condition at the time of the accident, and that the wreck in which the plaintiff was injured was caused by the engine or roadbed, either or both, being in such condition, plaintiff would be entitled to the verdict.' I charge you that it does not necessarily mean that the

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verdict should be for the amount claimed, if you find the plaintiff is entitled to a verdict, but for an amount that you think the plaintiff has reasonably proven his damages to be. '(2) That an employee has the right to assume without examination that the appliances furnished him to work with or upon by his employees are safe and sound.' That is, in the first instance. If, after working that machinery, he finds that it is unsound, and, knowing it to be in an unsound condition, that it has such defect in it that a prudent engineer would not use, then he would assume his own risk under those circumstances. '(3) If the jury found from the evidence that the defendant company were operating the Carolina, Cumberland Gap & Chicago Railway, as alleged in the complaint, at the time the injury was received by the plaintiff, it would make no difference as to the liability of the defendant company that the accident occurred on the said Carolina, Cumberland Gap & Chicago Railway, for the defendant company would be liable for any negligence in operating said railway, the same as if the same were owned by the defendant company.' That I charge you to be the law. If you find that the defendant, the South Carolina & Georgia Railway, were operating this railroad, and they did it negligently, in the manner complained of by plaintiff, they could not escape liability by reason of the fact that it was not their roadbed. If they had it in charge, operating it, they are responsible for liabilities. Some of these requests I have allowed and some disallowed; and so with reference to defendant's requests, I have allowed some and disallowed others for reasons stated on separated sheet.

"The defendant requests me to charge you: 'Railroad companies do not warrant their employees the safe condition of their line, nor the absolute security of their appliances, machinery, and roadbed. They only guaranty that due care will be used in constructing and keeping them in repair, and due care used in operating the line, appliances and machinery.' I charge you that is the law. 'When the railroad has exercised all of

the care and caution which a prudent man would take for the safety and protection of his own person, the law does not hold it liable for the consequences of a defect which could not be discovered by careful inspection.' I charge you that to be the law. 'The fifth request I do not charge. '(6) The liability of the railroad to its employees or servants being dependent upon its negligence, it is not liable for injuries to them resulting from inevitable accidents or misfortunes, such as could not be averted by diligence in the management of the road.' I charge you that to be the law. '(7) The jury is charged that if they find from the evidence that the engine of the defendant, upon which the plaintiff was traveling, was well constructed, and in reasonably fair order, and that it was thrown from the track through the culpable act of some person, known or unknown, who maliciously or mischievously placed spikes or other obstructions upon the track, by which the engine was derailed without the knowledge of the defendant or its agents and servants who had charge of the track, and without want of care on the part of the defendant or that of its agents in discovering such obstructions in time to remove them, then the plaintiff cannot recover, no matter what may be his misfortune in being injured, and the jury must find for the defendant.' I charge you that to be the law. If you find some malicious person, unknown to the railroad, placed an obstruction there on that track, and the railroad did not let the obstruction remain there an unreasonable length of time, and through that obstruction the engine was derailed, and the accident occurred by reason of that, the railroad would not be liable. On this principle, if you are riding upon a passenger train, and some wicked person fires into the train, and shoots you, you could not hold the railroad responsible for that unless the railroad did some act to bring it about, or was negligent in some act in the premises. The eighth request I refuse. '(9) The testimony must not only establish that the defendant was guilty of negligence, but it must establish that the injury arose from such negligence; in

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other words, that the injury was proximately caused by the negligence of the defendant company, its agents and servants.' I charge you that to be the law. The tenth I refuse. '(11) The employer, or the railroad company, as in this case, is not bound to use the safest machinery, or the newest invention in machinery, or in the keeping up of their roadbed; but if they use machinery that is suitable for the work, and exercise that degree of skill and labor which is ordinarily used in the keeping up of a roadbed, employing proper section masters or inspectors, who properly and carefully discharge their duty, and, notwithstanding such discharge of duty and such exercise of ordinary care and diligence, an injury occurs to an employee, then the railroad company is not responsible in damages, and the verdict must be for the defendant.' I charge you that is the law. The twelfth I charge you, modified as appears upon the record: "It is claimed that the engine was defective in the way as is alleged in the complaint, and sought to be proven in the evidence. The jury should first inquire whether or not there was any defect in any way in the engine, and then they should inquire whether or not such defect contributed to the accident, or brought it about; and, even if they be satisfied that there was a defect in the engine which contributed or brought about the accident, or, in other words, which caused the engine to mount the track, then they should enter upon the important inquiry whether or not the plaintiff, Parker, knew of these defects in the engine, and continued to use the engine with the knowledge of these defects;" and if they were such that an engineer of ordinary prudence and caution would not have used under the circumstances, the plaintiff cannot recover. That I charge you. The thirteenth I refuse. If you should find a verdict for the plaintiff, Mr. Foreman and gentlemen of the jury, you are at liberty, in estimating the damages, to take into consideration the doctor's bill, nursing, pay for drugs, and for whatever pain, suffering, or anguish you might find the plaintiff has reasonably proven his

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case to amount to. In coming to your conclusion you should throw aside all sympathy or prejudice. You are not here to award sympathy or to punish corporations, but you are to try the issues between these litigants, and come to a solution who is in the wrong, if either is in the wrong. Has the plaintiff made out his case by the preponderance of the evidence, and, if so, what reasonable damages has he established? If you find he has made out a case of damages by the preponderance of the evidence, then you assess his damages. If you find the railroad has not been negligent, or if you should find that the act was the act of some malicious person who obstructed that road, and that the railroad was not negligent in removing such obstruction, in that event he could not recover, and it would be your duty to find for the defendant. If you find for the plaintiff, simply say: 'We find for the plaintiff so many dollars and cents,' writing it out in letters. If you find for the defendant, simply say: 'We find for the defendant.' In either event, sign your name as foreman. Take the record, and find your verdict."

The jury found a verdict for the plaintiff in the sum of \$2,500, upon which judgment has been entered. Due notice of appeal has been given, and the defendant appeals to the supreme court on the following exceptions:

"First. That his honor, JUDGE GARY, erred, it is respectfully submitted, in granting his order of February 21, 1896, in which, among other things, he directed 'that the defendant, the South Carolina & Georgia Railroad Company, do give to the plaintiff, J. R. Parker, or his attorneys, within ten days from this date, an inspection and a copy, or permit the said J. R. Parker or his attorney to take a copy, of any books, papers or documents in the possession or control of the said South Carolina & Georgia Railroad Company containing any evidence relating to a lease or any agreement by or under which they may have operated the Carolina, Cumberland Gap & Chicago Railroad, on or prior to the month of June, 1895,' in that, it is respectfully submitted, that upon the facts before his honor at the time,

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there was no foundation in the law for said order. Second. That his honor, JUDGE GARY, at the trial of the case, in his charge to the jury, erred in charging them, among other things, as follows: That in estimating the damages you are at liberty 'to take into consideration the doctor's bill,'—in that it is submitted that there was no testimony in the case which warranted said charge, the testimony plainly showing that Parker had never incurred or paid a doctor's bill, but that, to the contrary, the doctors who attended him were employed by the railroad company, and looked to the railroad company for pay. Third. That his honor erred in not charging the defendant's second request to charge, as follows: 'In this charge of negligence brought by the plaintiff against the defendant, the burden of proof of establishing the negligence is upon the plaintiff, and no presumption of negligence arises from the mere fact that the engine jumped from the track, or that the plaintiff was injured. In cases between passengers and a railroad company, when there is an accident, ordinarily there is a presumption of negligence; but in cases between the employees or servants of the railroad company and such railroad no such presumption arises from the occurrence of the accident which caused the injury complained of, and the burden is upon the plaintiff to satisfy the jury that there was negligence,'—in that it is submitted that said request to charge is in accordance to the law. Fourth. That his honor erred in not charging the defendant's third request to charge, as follows: 'That as between passengers and a railroad company, when an injury has happened, the measure of care is extraordinary care, and the company is held liable for the slightest negligence; but not so as between employees (as in this case) and the railroad company, where the measure is only the exercise of ordinary care and diligence,'—in that it is submitted that the said request is in accordance with the law. Fifth. That his honor erred in not charging the defendant's fifth request to charge, as follows: 'In a case like the

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present one the proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence, but whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury, nor that the company should have employed any particular means which it may appear, after the accident, would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident,'—in that it is submitted that said request is in accordance with the law. Sixth. That his honor erred in not charging and refusing to charge the eighth request of the defendant as follows: 'The jury is further charged that the plaintiff must introduce evidence to show that the injury is more naturally to be attributed to the negligence of the defendant than any other cause, or he cannot recover. If the accident appears, upon the evidence, to be as consistent with the absence of negligence for which the defendant is responsible as with the existence of such negligence, the plaintiff must fail, and the verdict must be for the defendant,'—in that it is submitted that said request is in accordance with the law. Seventh. That his honor erred in not charging the tenth request of the defendant, as follows: 'An employee of a railroad company, in entering into the service thereof, knows, or is taken to know, that there are extraordinary dangers inseparable from such a service which human care and foresight cannot always guard against. He is not bound to incur these unknown perils, incident to the service, and may refuse to do so; or he may, as far as can be done, provide for them, in the rate of compensation or otherwise. But if he voluntarily engages to serve in view of all the hazards to which he will be exposed, it is well settled that, as between him and his employer, he undertakes to run all of the ordinary risks of the service; and this includes the risk of the injuries which

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may arise from an unexpected cause, and which could not be guarded against by the exercise of ordinary care and diligence. And if the jury in this case find from the evidence that the plaintiff was injured by such an accident, arising from an unexpected cause, which could not be guarded against by the exercise of ordinary care and diligence, he cannot recover,'—which request to charge, we submit, is in accordance with the law. Eighth. That his honor erred in not charging the defendant's thirteenth request as follows: 'That an employee who works defective machinery, knowing the defect, assumes the risk, and, if injured from such defect, cannot recover, even if his employer knows it. . In order to shift the responsibility to the employer, he must have promised to repair. In this case the jury is charged that if, in February, 1895, Parker delivered the engine No. 6 to Blackwood, the repairing agent of the defendant, and they find he promised to repair it, as to the parts claimed to be out of repair, and dangerous, yet, if they further find that he did not do so, and Parker again accepted said engine, and in a dangerous condition, known to him, ran it from time to time until June 25, 1895, and that from such condition of said engine he was then injured, he cannot recover, no matter how many times he again notified the agents of the company, unless they again promised to repair.' "

Joseph W. Barnwell, Henderson Bros., and N. G. Evans, for appellant.

Croft & Tillman and Sheppard Bros., for respondent.

McIVER, C. J. This is an appeal from a judgment entered on a verdict obtained by plaintiff against defendant in an action to recover damages for injuries sustained by the plaintiff, occasioned, as is alleged, by the negligence of defendant, while plaintiff was in the employment of defendant as an engineer running one of the defendant's locomotives. The exceptions for the purposes of this appeal, other than the first, are

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based upon alleged errors of omission and commission in the charge of the circuit judge, and, therefore, for a full understanding of the questions presented, it will be necessary that the requests to charge together with the charge in full as set out in the "case," as well as the exceptions upon which the appeal is taken, should all be incorporated in the report of this case.

It seems that the disaster which occasioned the injuries of which plaintiff complained occurred on the line of the Carolina, Cumberland Gap & Chicago Railway Company on the 25th of June, 1895, at which time, as plaintiff alleged in his complaint, the defendant company was operating the said Carolina, Cumberland Gap & Chicago Railway under a lease or agreement executed by the receiver of said last-mentioned railway company. This allegation it became necessary for the plaintiff to prove under the general denial in defendant's answer; and, as such alleged lease was not on record in any of the offices in which such a paper was required to be recorded, the plaintiff gave due notice of a motion, based upon affidavits, for an order requiring the defendant company to deliver to the plaintiff a copy of the agreement under which the defendant company was operating the Carolina, Cumberland Gap & Chicago Railway during the month of June, 1895. This motion was heard by his honor, JUDGE ERNEST GARY, who, on the 21st of February, 1896, granted the order to which error is imputed by the first exception upon the ground that "upon the facts before his honor at the time there was no foundation in law for said order." It will be observed that there is no particular specification of error in the exception, and hence it might possibly be disregarded as too general to require its consideration. But, waiving this, we learn from the argument that the specific error complained of is that the object of the motion was to obtain a copy, or inspection, of a document which the plaintiff desired to use in making out his own case, and not of a document which defendant proposed to use in making out its defense; and

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that this court has decided in two cases—*Cartee v. Spence*, 24 S. Car. 558, and in *Jenkins v. Bennett*, 40 S. Car. 400, that such is not the object of section 389 of the Code, under which this motion was made. An examination of those cases, however, will show that no such point was decided in either of those cases. While it is true that in *Cartee v. Spence* an intimation was thrown out as to the effect claimed by counsel for appellant, yet the court distinctly declined to decide the point, and rested its decision expressly upon another ground. So, in *Jenkins v. Bennett*, the court, in terms, declined to solve the doubt suggested in *Cartee v. Spence*, resting its decision upon another ground. Neither do we think it is necessary now to decide what is the proper construction of section 389 of the Code, for the reason that the order to which exception is taken amounted practically to nothing. Copies or inspection of the papers desired were not obtained under that order, and, therefore, appellant suffered no injury from it. The evidence that the defendant company was operating the Carolina, Cumberland Gap & Chicago Railway at the time of the accident seems to have been obtained another way,—apparently in the mode suggested in *Cartee v. Spence*,—and, so far as appears, no exception is taken to such evidence. It is manifest, therefore, that even if the order in question was erroneously granted, it was a harmless error. The first exception must be overruled.

The second exception is based upon the unfounded assumption that Drs. Hill and Tompkins were employed by the defendant company to attend the plaintiff, and that such company, and not the plaintiff, was liable to those doctors for their medical attention. There is nothing in the testimony to sustain such an assumption. Neither of the doctors, in their testimony, say that they were employed by the defendant company, or that they looked to it for payment of their bill. The fact that defendant company, after the accident had occurred,—how soon after does not appear,—gave Messrs. Hill and Tompkins no-

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ployees—Damages.*

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tice that an accident had occurred, in which plaintiff was injured, is very far from showing that the company had employed these doctors to attend the plaintiff, or that it would be responsible for their bill. That notice was, manifestly, given in obedience to section 1690, Rev. St. 1893, in order to escape the penalty therein provided for. Indeed, the testimony shows that Messrs. Hill and Tompkins had already taken charge of the case, and were rendering their medical services to the plaintiff, presumably with his consent, before the notice was given to Messrs. Hill and Tompkins; and this would raise a liability on the part of plaintiff to pay for such services. The fact that the plaintiff had not paid the medical bill at the time of the trial amounts to nothing. If he was liable for it, as he unquestionably was, the circuit judge was clearly right in instructing the jury that, in estimating the damages sustained by the plaintiff, they might take into consideration the amount of the doctor's bill. This exception must be overruled.

The third exception cannot be sustained. Inasmuch as the circuit judge had, in his general charge, instructed the jury that the rule was different in a case brought by a passenger from that in which the action is brought by an employee, and that in the latter case the plaintiff must make out a case of negligence by the preponderance of the evidence, it seems to us that the proposition of law

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Negligence—Bur-
den of Proof.

upon which the second request is based had been already charged, and need not have been repeated, as demanded by this request. True, the same phraseology was not used, but nothing is better settled than that there is no error in declining to use the precise phraseology in which a request to charge is couched, provided the principle of law involved is correctly laid before the jury. The point of this exception seems to be that there is error in not saying to the jury that in a case like this there was no presumption of negligence, as there would be in a case brought by a passenger, but that the burden of proof was upon the plaintiff to

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show negligence on the part of the defendant company. In the first place, we see nothing in the case which called for any such specific instruction. It does not appear that the plaintiff claimed that there was any presumption of negligence. And, if there had been, the judge's instruction to the jury held the plaintiff to the duty of showing by the preponderance of the evidence that the disaster was caused by the negligence of the defendant; and this was only another way of saying that the burden of the proof was on the plaintiff to show negligence on the part of defendant.

The fourth exception must likewise be overruled for the same reason. The judge had already charged the jury as to the difference in the degree of care required in case of a passenger and in a case brought by an employee, and there was no error in omitting to repeat that instruction.

The fifth, sixth, and seventh exceptions cannot be sustained, for the reason that the proposition of law upon which the requests therein referred to are based were sufficiently covered by the charge of the circuit judge, and there was no error on his part in refusing to repeat those propositions in the language in which appellant saw fit to present these requests.

It only remains to consider the eighth exception, which must also be overruled. The law in reference

to the case of an employee who uses defective machinery or appliances after knowledge of such defects was, it seems to us, fully and correctly stated by the circuit judge, and for this reason there was no error in refusing to charge defendant's thirteenth request. In addition to this, such an instruction as was there requested would have been an invasion of the province of the jury; for, as was said in *Lasure v. Manufacturing Co.*, 18 S. Car. 281: "It does not follow necessarily that a servant is guilty of contributory negligence because he remains in the service of his master after he has knowledge of defects in the machinery or appliances with which he is furnished to perform his work, but it is a

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Notes.

question of fact for the jury to determine under all the circumstances of such particular case;" citing Wood, Mast. & S. § 357; *Snow v. Railroad Co.*, 8 Allen, (Mass.) 441. The judgment of this court is that the judgment of the circuit court be affirmed.

NOTES.

Damages—Surgical Aid.—That the jury in estimating damages sustained by an employee through the fault of his master may take into consideration the amount of the doctor's bill for attendance, see *Chicago, etc., R. Co. v. Holland*, 30 Am. & Eng. R. Cas. 590, 122 Ill. 461; *affirming* 18 Ill. App. 418; *Riley v. West Virginia Cent. etc., R. Co.*, 27 W. Va. 145.

In *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486.—*affirming* 41 Ill. App. 311, where plaintiff alleged that he expended large sums of money in effecting a cure for the injuries received. It will not be sufficient for him to prove merely that he has paid a certain physician's bill; he must also show that by reason of his injuries he necessarily incurred such bill and that it was reasonable.

Same—Proof of Payment.—In *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 41 Ill. App. 311, plaintiff alleged that by reason of his injuries he "was compelled to, and did lay out and expend divers large sums of money in and about being cured of his said injuries." But there was no averment of his having incurred any liabilities in that behalf other than those which he had paid. It was held that the defendant could not object for the first time on appeal that evidence of a physician's bill was inadmissible in behalf of the plaintiff because of the absence of proof that it had ever been paid.

Contributory Negligence—Questions of Law and Fact—Knowledge of Defective Appliances.—The question of negligence on the part of an employee in remaining in company's employ after knowledge of defective machinery, is a question of fact for the jury under all the facts of the case. *Greenleaf v. Dubuque, etc., R. Co.*, 33 Iowa 52, *following* *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441. To the same effect see *New Jersey, etc., R. Co. v. Young*, 1 U. S. App. 96, *affirming* 46 Fed. Rep. 160, and *distinguishing* *Muldowney v. Illinois Cent. R. Co.*, 32 Iowa 176. Thus it is a question of fact whether a servant is guilty of negligence in continuing to use defective machinery for a reasonable time for the master to make needed repairs after his promise to do so. *Missouri Furnace Co. v. Abend*, 107 Ill. 44, *affirming* 9 Ill. App. 319; *Coontz v. Missouri Pac. R. Co.*, 115 Mo. 669; 59 Am. & Eng. R. Cas. 169, *Hough v. Texas, etc., R. Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451.

In *Thorpe v. Missouri Pac. R. Co.*, 89 Mo. 650, it was held that if the defect or insufficiency in the appliance is so great that obviously with the use of great care and caution the danger is imminent, then as a matter of law the servant who incurs the risk is guilty of contributory negligence and cannot recover, but if upon this question there is substantial doubt, the question is one of fact for the jury.

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v.

ELLIS.

(Supreme Court of the United States, Jan. 18, 1897.)

Claims against Railway Companies—Attorneys' Fees—Validity of Statute.*—A state statute provided that if a valid *bona fide* claim, of not more than \$50, against a railway company, for personal service or damages, or for over charges on freight, or for destruction or injury of stock by its trains, was not promptly paid when presented under oath, and the claimant was thereby compelled to resort to a suit, the corporation, if ultimately cast in the suit, should pay to the plaintiff an attorney's fee of \$10, as part of the costs of the litigation. *Held*, that such statute is void as denying to railroad companies the equal protection of the law.

IN ERROR to the Supreme Court of the State of Texas.

On April 5, 1889, the legislature of the state of Texas passed this act :

"Section 1. Be it enacted by the legislature of the state of Texas, that after the time that this act shall take effect, any person in this state having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed \$50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presenta-

*See note at end of case.

tion, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the court or jury trying the issue." Supp. Sayles' Rev. Civ. St. p. 768, art. 4266a.

On October 9, 1890, defendant in error commenced this action before a justice of the peace, to recover \$50 for a colt killed by the railway company. The complaint alleged presentation and nonpayment, as required by the act, and demanded \$10 attorney fee. The company answered, admitting everything except the claim for the attorney fee. The case passed, after judgment in favor of the plaintiff for the amount claimed and an attorney fee of \$10, through the district court and the court of civil appeals, to the supreme court of the state, by which, on May 10, 1894, the judgment against the company was affirmed. 87 Tex. 19. To reverse such judgment the company sued out this writ of error.

E. D. Kenna and J. W. Terry, for plaintiff in error.

MR. JUSTICE BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

The single question in this case is the constitutionality of the act allowing attorney fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases.

We have not been favored with any argument or

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brief from the defendant in error. Doubtless he believed, and justly, that nothing could be added to the arguments so fully and strongly made in support of the constitutionality of this law in the respective opinions of the two highest courts of the state.

The supreme court of the state considered this statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them when, for like delinquencies, it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts, as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

It is true, the amount of the attorney's fee which may be charged is small, but, if the state has the power to thus mulct them in a small amount, it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As well said by Mr. JUSTICE BRADLEY in *Boyd v. U. S.*, 116 U. S. 616, 635: "Illegitimate and unconstitutional practices get their first footing in

that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

While good faith and a knowledge of existing conditions on the part of a legislature are to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action.

It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States. *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 24 Am. & Eng. R. Cas. 525; *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 181, 189; *Railway Co. v. Mackey*, 127 U. S. 205; *Railway Co. v. Herrick*, 127 U. S. 210; *Railway Co. v. Beckwith*, 129 U. S. 26; *Railroad Co. v. Gibbes*, 142 U. S. 386, 48 Am. & Eng. R. Cas. 595; *Road Co. v. Sandford*, 164 U. S. 578. The rights and securities guarantied to persons by that instrument cannot be disregarded in respect to these artificial entities called "corporations" any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens. But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that,

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if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (*Hayes v. Missouri*, 120 U. S. 68; *Railway Co. v. Mackey*, 127 U. S. 205; *Walston v. Nevin*, 128 U. S. 578, 27 Am. & Eng. Corp. Cas. 198; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Express Co. v. Seibert*, 142 U. S. 339; *Giozza v. Tiernan*, 148 U. S. 657; *Railroad Co. v. Wright*, 151 U. S. 470; *Marchant v. Railroad Co.*, 153 U. S. 380; *Railway Co. v. Mathews*, 165 U. S. 1), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.

As well said by BLACK, J., in *State v. Loomis*, 115 Mo. 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employees any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws.

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and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and, therefore, not the law of the land."

In *Vanzant v. Waddel*, 2 Yerg. (Tenn.) 260, 270, CATRON, J. (afterwards MR. JUSTICE CATRON of this court), speaking for the supreme court of Tennessee, declared: "Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another."

In *Dibrell v. Morris*, 89 Tenn. 497, BAXTER, SPECIAL JUDGE, reviewing at some length cases of classification, closes the review with these words: "We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this state, the basis of such classification must be natural and not arbitrary."

In *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, the question was presented as to the power of the state to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the court, by MR. JUSTICE BRADLEY, saying, on page 237, 134 U. S.: "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our

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governments, might be obnoxious to the constitutional prohibition."

It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroad of all corporations are selected to bear this penalty. The rule of equality is ignored.

It may be said that certain corporations are chartered for charitable, educational, or religious purposes, and abundant reason for not visiting them with a penalty for the non-payment of debts is found in the fact that their chartered privileges are not given for pecuniary profit. But the penalty is not imposed upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations, and others like them, are exempt. Further, the penalty is imposed, not upon all corporations charged with the *quasi* public duty of transportation, but only upon those charged with a particular form of that duty. So the classification is not based on any idea of special privileges by way of incorporation, nor of special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties.

But, if the classification is not based upon the idea of

special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the fourteenth amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Railway Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged,—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations.

While this action is for stock killed, the recovery of attorneys' fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and, as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state.

But a mere statute to compel the payment of indebt-

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edness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while, in certain cases, there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

Neither can it be sustained as a proper means of enforcing the payment of small debts, and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors, and punishes it for a failure to perform certain duties,—duties which are equally obligatory upon all debtors : a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful con-

sideration than these words of MR. JUSTICE MATTHEWS, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 13 Am. & Eng. Corp. Cas. 187 : "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." The first official action of this nation declared the foundation of government in these words : "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

Questions of this character have been frequently presented to the courts, and it is well to notice a few of the decisions. In Alabama a statute provided that a railroad corporation, or any complainant against it, taking an appeal from a judgment of a justice of the peace in a suit for damages to live stock, and failing to sustain such appeal, should be liable for a reasonable attorney's fee incurred by reason thereof. Code Ala. 1715. This statute was less obnoxious to the charge of discrimination than the one before us, in that it gave the same right to the corporation as to its adversary, and it was limited to cases in which an appeal was taken from a judgment already rendered by a competent judicial officer ; yet the supreme court of that state

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(*Railroad Co. v. Morris*, 65 Ala. 193) held it in conflict with both the state and the fourteenth amendment to the United States constitution, saying: "Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions." And again: "The section of the Code under consideration (1715) prescribes a regulation of a peculiar and discriminative character in reference to certain appeals from justices of the peace. It is not general in its provisions, or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax fee not to exceed twenty dollars. A law which would require all farmers who raise cotton to pay such a fee in cases where cotton was the subject-matter of litigation, and the owners of this staple were parties to the suit would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians or merchants or ministers of the gospel would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the bill of rights of every state constitution of the various commonwealths of the American government."

In Mississippi an act somewhat similar in its nature

(Laws Miss. 1882, p. 110) was adjudged unconstitutional (*Railroad Co. v. Moss*, 60 Miss. 641), the court saying, on page 646: "The right of appeal cannot be fettered and clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances."

In Michigan a statute was passed (Laws Mich. 1885, c. 234) authorizing the taxing of an attorney's fee of \$25 in actions against a railroad company for damages for cattle killed, and the supreme court of that state held it unconstitutional (*Wilder v. Railway Co.*, 70 Mich. 382), saying, on page 384, 70 Mich.: "Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of \$25, if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of \$10 in the justice's court; but, if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the \$10 and an additional penalty of \$25; for it is nothing more or less than a penalty. Calling it an 'attorney's fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and

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injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist." *Lafferty v. Railway Co.*, 71 Mich. 35.

So, in Arkansas, an act was passed providing that when stock was killed by a railroad company the owner might demand an appraisal, and that, if the appraised value was not paid within a certain time, and an action was brought, an attorney fee for the plaintiff might be taxed and collected; but it was held by the supreme court (*Railway Co. v. Williams*, 49 Ark. 492, that such legislation could not be sustained. It was construed to be an act imposing a penalty for a failure to abide by an award of appraisers, and contesting its validity in the courts. It is worthy of note that in the same volume is found a decision by the same court, sustaining a statute allowing an attorney fee in actions for the recovery of overcharges by railroads (*Dow v. Beidelman*, 49 Ark. 455), but the statute had prescribed the rates of charge for the carriage of passengers by railroads, had forbidden an overcharge, and it was as a penalty for failure to comply with such police regulations that the allowance of an attorney fee was sustained. See, also, *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, in which, it appearing that there was no statutory obligation on railroad companies to fence their right of way, a statute allowing attorney fees in actions to recover damages for stock killed was declared to be unconstitutional; and *Chair Co. v. Runnels*, 77 Mich. 104, in which an act authorizing an attorney fee to be taxed in entering judgments for personal services was set aside. Besides these cases involving attorney fees, are others in which legislation imposing special burdens on an individual or a class has been declared beyond the power of the legislature as against equality of right. In *Railroad Co. v. Wilson*, 19 S. W. 910, the court of appeals of Texas held that a statute providing that, in

the event of a railroad company's refusing to pay its indebtedness to an employee within 20 days after demand, he could recover as damages 20 per cent. in addition to the amount due, was class legislation and unconstitutional. In the course of the opinion, after referring to those statutes allowing double damages for stock killed, the court observed: "But when we consider the relations of railway companies to their own servants, both as to contracts of employment and payment, we find a field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons." In *Railroad Co. v. Baty*, 6 Neb. 37, there was presented for consideration a statute which gave to the owner of live stock accidentally killed or destroyed on a railroad track double its value, and it was held that the statute was void. *Millett v. People*, 117 Ill. 294, 15 Am. & Eng. Corp. Cas. 1, in which an act of the legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner was held invalid as beyond the power of the legislature to single out certain individuals, and impose upon them burdens not imposed upon all. *Frorer v. People*, 141 Ill. 171, where an act which prohibited persons engaged in mining or manufacturing from keeping a store for furnishing supplies to their employees was held in conflict with the constitution. *Braceville Coal Co. v. People*, 147 Ill. 66, where a like ruling was made in respect to a statute requiring certain specified corporations to pay the wages of their employees weekly. *Eden v. People*, 161 Ill. 296, which set aside a statute forbidding barbers, and barbers only, to keep open their shops or work at their trade on Sundays. *Durkee v. City of Janesville*, 28 Wis. 464, in which an act providing that no costs should be recovered against the city in an action commenced to set aside any assessment or tax deed, or to prevent the collection of taxes in said city, was held to conflict with the rule of equality in that suitors in all other cases were entitled to recover their costs; the court saying, on page 471, that: "It is

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obvious there can be no certain remedy in the laws where the legislature may prescribe one rule for one suitor or class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged to buy justice, and pay for it ; thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision." *City of Janesville v. Carpenter*, 77 Wis. 288, in which a statute authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature, was likewise held to be void, as discriminating and class legislation, in violation of the spirit of the constitution, and contrary to public justice.

In *State v. Goodwill*, 33 W. Va. 179, the supreme court of appeals of West Virginia held unconstitutional a statute which prohibited persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as was specified in the act ; and on the same day, in *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, the same court also set aside another statute which prohibited persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling any merchandise or supplies to their employees at a greater per cent. of profit than they sell to others not employed by them. In *Park v. Press Co.*, 72 Mich. 560, it was held that an act limiting the recovery in suits brought for libel in certain cases to actual damages, as defined in the act, was not within the scope of constitutional legislation. In *Pearson v. City of Portland*, 69 Me. 278, a statute, which provided that no damages for injury to person or property caused by a defect in the highway, could be recovered of any city or town by any person who, at the time the damage was

done, was a resident of any country where damage done under similar circumstances was not by the laws of that country recoverable, was held to conflict with the equality clause of the fourteenth amendment of the United States constitution.

It must not be understood that by citing we endorse all these decisions. Our purpose is rather to show the extent to which the courts of the various states have gone in enforcing the constitutional obligation of equal protection. Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy cannot be sustained. The judgment of the supreme court of Texas is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE GRAY, with whom concurred MR. CHIEF JUSTICE FULLER and MR. JUSTICE WHITE, dissenting.

The CHIEF JUSTICE, MR. JUSTICE WHITE, and myself are unable to concur in this judgment. The grounds of our dissent may be briefly stated.

Costs in civil actions at law are the creature of statute. From early times, there have been statutes making different rules as to costs, according to the nature of the issue, and the amount involved; and sometimes allowing costs to the prevailing party when plaintiff, and not when defendant. The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, and the right to costs as depending upon the nature of the suit, upon

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the amount or value of the thing sued for or recovered, or upon other circumstances, is, and always has been, within the regulation and control of the legislature, exercising its discretionary power, not oppressively to either party, but as the best interests of the litigants and of the public may appear to it to demand. Bac. Abr. "Costs," *passim*; Postan v. Stanway, 5 East, 261; Green v. Liler, 8 Cranch, 229, 242; Kneass v. Bank, 4 Wash. C. C. 106, Fed. Cas. No. 7,876; Lowe v. Kansas, 163 U. S. 81.

The statute of the state of Texas, now in question does but enact that any person having a valid *bona fide* claim, not exceeding \$50, against a railroad corporation, for personal services or damages, or for overcharges on freight, or for destruction or injury of stock by its trains, and presenting the claim, verified by his affidavit, to the corporation, and, if it is not paid within 30 days, suing thereon in the proper court, and finally obtaining judgment for the full amount thereof in that court, or in any court to which the suit may be appealed, shall be entitled to recover, in addition to other costs, a reasonable attorney's fee (if he has employed an attorney) not exceeding \$10, to be assessed and awarded by the court or jury trying the issue. Gen. Laws Tex. 1889, p. 131, c. 107; Supp. Sayles' Rev. Civ. St. p. 768, art. 4266a. In other words, if an honest claim, of not more than \$50, and coming within one of those classes of small claims which most commonly arise between individuals and railroad corporations, is not promptly paid when presented under oath, and the claimant is thereby compelled to resort to a suit, the corporation, if ultimately cast in the suit, must pay to the successful plaintiff a very moderate attorney's fee, as part of the costs of the litigation.

The legislature of a state must be presumed to have acted from lawful motives, unless the contrary appears upon the face of the statute. If, for instance, the legislature of Texas was satisfied, from observation and experience, that railroad corporations within the state

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were accustomed beyond other corporations or persons, to unconscionably resist the payment of such petty claims, with the object of exhausting the patience and the means of the claimants, by prolonged litigation, and perhaps repeated appeals, railroad corporations alone might well be required, when ultimately defeated in a suit upon such a claim, to pay a moderate attorney's fee, as a just, though often inadequate, contribution to the expenses to which they had put the plaintiff in establishing a rightful demand. Whether such a state of things as above supposed did in fact exist, and whether, for that or other reasons, sound policy required the allowance of such a fee to either party, or to the plaintiff only, were questions to be determined by the legislature, when dealing with the subject of costs, except in so far as it saw fit to commit the matter to the decision of the courts.

The constitutionality of statutes allowing plaintiffs only to recover an attorney's fee, as part of the judgment, in particular classes of actions selected by the legislature, appears to have been upheld by the courts of most of the states in which it has been challenged. *Railway Co. v. Mower*, 16 Kan. 573, 582; *Railroad Co. v. Yanz*, 16 Kan. 583; *Railway Co. v. Duggan*, 109 Ill. 537; *Vogel v. Pekoc*, 157 Ill. 339; *Dow v. Beidelman*, 49 Ark. 455; *Perkins v. Railway Co.*, 103 Mo. 52; *Railway Co. v. Dey*, 82 Iowa 312, 340; *Wortman v. Kleinschmidt*, 12 Mont. 316; *Railway Co. v. Ellis*, 87 Tex. 19; *Cameron v. Railway Co.*, 63 Minn. 384.

It is to be regretted that so important a precedent as this case may afford for interference by the national judiciary with the legislation of the several states on little questions of costs should be established upon argument *ex parte* in behalf of the railroad corporation, without any argument for the original plaintiff. But it is hardly surprising that the owner of a claim for \$50 only, having been compelled to follow up, through all the courts of the state, the contest over this \$10 fee, should at last have become discouraged,

Note.

and unwilling to undergo the expense of employing counsel to maintain his rights before this court.

NOTE.

Attorneys' Fees.—In *Peoria, etc., R. Co. v. Duggan*, 20 Am. & Eng. R. Cas. 489, 109 Ill. 537; *Perkins v. St. Louis, etc., R. Co.*, 103 Mo. 52; Illinois, etc., *R. Co. v. Crider*, 56 Am. & Eng. R. Cas. 157, 91 Tenn. 489, statutes allowing attorney's fees where plaintiff recovers from railroad were held constitutional. The Texas Act held unconstitutional in the principal case, was held constitutional in Gulf, etc., *R. Co. v. Ellis*, (Tex.) 49 Am. & Eng. R. Cas. 509; in South, etc., *R. Co. v. Morris*, 65 Ala. 193, *reviewed* in Chicago, etc., *R. Co. v. Moss*, 20 Am. & Eng. R. Cas. 555, 60 Miss. 641; the Alabama statute allowing an attorney fee not to exceed \$20, to be taxed as part of the costs against the unsuccessful appellant in every suit against a railroad for stock killed, was held unconstitutional. So in St. Louis, etc., *R. Co. v. Williams*, 49 Ark. 492, 31 Am. & Eng. R. Cas. 555, *distinguished* in Illinois, etc., *R. Co. v. Crider*, 91 Tenn. 489, an act providing for arbitration in cases of stock killed or injured by a railroad and further providing that if either party refused to abide by the award and took the case into the courts and failed to obtain a favorable judgment, such party should be assessed a reasonable attorney's fee, was held unconstitutional. In Denver, etc., *R. Co. v. Outcalt*, 2 Colo. App. 395, a law which provided for the recovery of a reasonable attorney's fee in case of failure to pay the appraised value within a time prescribed was held void. See also, Denver, etc., *R. Co. v. Davidson*, 2 Colo. App. 443; *Lafferty v. Chicago, etc., R. Co.*, 71 Mich. 35; *Schut v. Chicago, etc., R. Co.*, 70 Mich. 433; *Wilder v. Chicago, etc., R. Co.*, 35 Am. & Eng. R. Cas. 162, 70 Mich. 382; *Rio Grande, etc., R. Co. v. Vaughan*, 3 Colo. App. 465.

ABSTRACTS OF RECENT DECISIONS.

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| <ol style="list-style-type: none"> 1. CARRIERS OF GOODS. 2. CARRIERS OF LIVE STOCK. 3. CARRIERS OF PASSENGERS. 4. CONTRACTS. 5. CROSSINGS. 6. DEATH BY WRONGFUL ACT. 7. EMINENT DOMAIN. 8. FIRES. | <ol style="list-style-type: none"> 9. HIGHWAYS. 10. MASTER AND SERVANT. 11. MISCELLANEOUS. 12. RIGHT OF WAY. 13. STOCK, INJURIES TO. 14. STREET RAILWAYS. 15. TAXATION. |
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1. CARRIERS OF GOODS.

Action for Failure to Deliver—Proper Plaintiff.—In *Louisville, etc., Co. v. Allgood*, (Ala. 1896), 20 So. Rep. 986, an action against a common carrier to recover for failure to deliver goods intrusted to it for transportation, BRICKELL, C. J., delivering the opinion of the court said: "The general rule is that *prima facie* a bill of lading operates a transfer to the consignee of the title to the goods shipped; and, in the absence of evidence removing the presumption, an action against the carrier for failure to deliver, or for the loss or injury to the goods while in his possession, will lie only at the suit of the consignee. 1 Brick. Dig. p. 29, § 129; *Robinson v. Pogue*, 86 Ala. 257, 5 South. 685; *Capehart v. Improvement Co.*, 103 Ala. 671, 16 South. 627. But if the consignee is not in fact the owner of the goods,—if he is the mere agent or factor of the consignor,—and, in the course of transportation, the goods are at the risk of the consignor, the right of action resides in him. *Hutch. Carr.* § 720."

Action for Injury to Freight—Proper Plaintiff.—Where property has been injured while in transit by the negligence of the carrier,

the owner of such property is the proper party to bring suit in an action arising *ex delicto*. *Waters v. Mobile, etc., R. Co.*, (Miss. 1897), 21 So. Rep. 240.

Action to Recover Injuries to Freight—Parties.—A car was chartered by the plaintiff, and he shipped in it over the defendant's line property of his own and property of two other persons. While in transit the freight was injured through the negligence of the carrier, and the plaintiff brought three separate actions to recover for such injuries, one for injuries to his own property and the others as agent for the other shippers, for injuries to their property. *Held*, that the actions brought by him as agent did not prevent him from suing to recover for the injuries to his own property. *Waters v. Mobile, etc., R. Co.*, (Miss. 1897), 21 So. Rep. 240.

Action for Failure to Deliver—Non-Payment of Freight.—In *Louisville, etc., R. Co. v. Allgood*, (Ala. 1896), 20 So. Rep. 986, an action against a common carrier to recover for failure to deliver goods intrusted to it for transportation, BRICKELL, C. J., delivering the opinion of the court said: "It was wholly immaterial, in any aspect of the case, whether the plaintiff had paid, or offered to

pay, or whether the defendant had claimed, demanded, or looked to him for payment of the freight. As a condition to the acceptance of the bark for transportation, the defendant could have demanded the payment of the freight; but having accepted the bark without such demand, free from liability, the defendant cannot be absolved by not claiming or demanding payment of freight from the shipper. *Hutch. Carr.* §§ 116, 117."

Action in Tort—Injury to Property in Shipment.—Where property shipped by a carrier of freight has been injured in transit through the negligence of the carrier, the shipper may waive the contract of shipment, and sue in tort to recover for such injuries. *Waters v. Mobile, etc., R. Co.*, (Miss. 1897), 21 So. Rep. 240.

Conversion—Damages.—In an action against a railway company to recover the value of goods shipped over its line which were sold by it upon the refusal of the consignee to accept them, when the alleged value of such goods is \$10.30, and there is testimony to show that they were worth from \$10 to \$12, a verdict for \$6 will not be disturbed. *Baker v. Chicago, etc., Ry. Co.*, (Iowa, 1896), 67 N. W. Rep. 376.

Loss of Freight by Fire—Liability of Carriers for Failure to Ship in Reasonable Time.—Where the petition in an action against a railway company to recover for goods destroyed by fire alleges that such goods were delivered to the defendant for shipment, and received by it with the promise and agreement to ship immediately to its destination, that the defendant carelessly and negligently failed to ship such goods within a reasonable time and they were destroyed by fire while in the defendant's possession at the point of shipment, such petition states a cause of action. *Hernsheim v. Newport News, etc., Co.*, (Ky. 1896), 35 S. W. Rep. 1115.

Refusal to Furnish Bill of Lading.—Where a state statute provided that railway companies should be liable to a penalty for refusal to give to the shipper, when he demanded it, "a bill of lading or memorandum in writing, stating the quantity, character, order and condition of the goods" shipped, a railway company cannot be held liable for failure to deliver to a shipper, at his request, bills of lading for cars which were loaded by such shipper at switch at which there was no agent and no car scales, and the shipper did not furnish the information as to the weight or quantity of the goods necessary to make out such bill, which information he had and knew the company did not have. *Couly v. Sherman, etc., Ry. Co.*, (Tex. 1897), 38 S. W. Rep. 519.

Retention of Bill of Lading—Title to Goods.—A car load of goods on which a portion of the purchase money had been paid were shipped by the seller to itself as consignee, and a draft for the balance due on such goods was attached to the bill of lading, the goods not to be delivered until the balance was paid and the bill of lading obtained. *Held*, that the title to such goods did not pass. *Baker v. Chicago, etc., Ry. Co.*, (Iowa, 1896), 67 N. W. Rep. 376.

2. CARRIERS OF LIVE STOCK.

Stock—Contract of Shipment—Limitation of Liability—Validity.—The agreement in a contract of shipment that no claim for loss or damage to stock shall be valid against the railroad company unless made in writing, verified by affidavit, and delivered to the general freight agent of the company, or to its agent at the station from which the stock is shipped, or to its agent at the point of destination, within ten days from the time the stock is removed from the cars, is in violation of a pro-

vision in a state constitution that no common carrier shall be permitted to contract for relief from its common-law liability. *Brown v. Illinois Cent. R. Co.*, (Ky. 1897), 38 S. W. Rep. 862.

Injured in Shipment—Measure of Damages.—In ascertaining the damages for stock injured in shipment, the market value of such stock at the point of destination, whether on or beyond the carrier's line, must govern. *St. Louis, etc., Ry. Co. v. De Shong*, (Ark., 1897), 39 S. W. Rep. 260.

Laws Regulating Transportation of Live Stock—Liability of Receivers for Failure to Comply.—A statute of the United States provides that any company, owner or custodian of live stock who knowingly and wilfully fails to comply with the laws of the United States relating to the transportation of live stock shall be liable to a penalty. *Held*, that such penalty cannot be recovered of the receivers of a railway company appointed by court to execute its orders. *United States v. Harris*, (1897), 78 Fed. Rep. 290.

Stock—Liability for Conversion by Connecting Carrier.—In *Little Rock, etc., Ry. Co. v. Odum*, (Ark., 1896), 38 S. W. Rep. 339, an action to recover for the conversion of cattle by a connecting carrier, where such cattle had been shipped under a contract with the defendant for their transportation, such contract providing that the defendant should not be liable for anything beyond its line excepting to protect the through rate of freight stated therein, *WOOD, J.*, delivering the opinion of the court, said: "Independent of contract, appellants were under no duty or obligation to transport appellee's cattle beyond their termini. *Packard v. Taylor*, 35 Ark. 402. There is nothing to show that they had assumed that relation to the public by reason of any usage or the character of their business. Then, since appellants were not, by law, common carriers as to these cattle

at the time of the alleged conversion, their liability depends solely upon their contract with appellee. *Piedmont Manuf'g Co. v. Columbia & G. R. Co.*, 19 S. C. 353; 3 *Wood, R. R.* § 452a. The contract was for through transportation from Clarksville, Ark., to Checotah, I. T. But the twelfth paragraph expressly exempts the Missouri Pacific Railway Company from liability 'for anything beyond' its line, 'excepting to protect the through rate of freight named therein.' Appellee is bound by the contract. *Railway Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134. The cases of *Railway Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803, and *Railway Co. v. Spann*, 57 Ark. 127, 20 S. W. 914, relied upon by appellee, are not analogous."

3. CARRIERS OF PASSENGERS.

Care to Be Exercised by Carriers of Passengers—Instructions—Error.—In *Payne v. Spokane St. Ry. Co.* (Wash. 1896), 46 Pac. Rep. 1054, an action by a passenger to recover for personal injuries, it was *held* error to give an instruction that "ordinary care is such care as persons usually engaged in the particular line of business in question ordinarily exercise in and about such business. If defendant in this case exercised such care at the time of the accident, it had discharged its full duty, and plaintiff cannot recover," as the question was not whether the defendant had exercised such care as was usually exercised in such business, but whether it had exercised the highest degree of skill and care which might be reasonably expected of intelligent and prudent persons engaged in the carriage of passengers, and which is required by law of such carriers.

Carriage of Dogs in Passenger Cars—Prohibition—Reasonableness.—Regulations prohibiting persons from taking dogs with

them to be carried on cars used for the carriage of passengers, and the rule requiring pay for carrying them in baggage cars, are reasonable, and the conductor of a train is justified in removing a passenger and the latter's dog from a passenger car in a proper manner when such passenger refuses to remove his dog, even though he has a ticket. *Gregory v. Chicago, etc., Ry. Co.* (Iowa, 1896), 69 N. W. Rep. 532.

Ejection of Passenger from Train.—A railway ticket purchased by a passenger had a limitation of the time for which it was good stamped on it. The passenger testified that the agent did not inform him that it was a limited ticket, but that he knew the company was selling such tickets previous to that time and his attention had been called to the indorsement on similar tickets sold by the company. He tendered such ticket for his passage after the limit had expired, and it was declined by the conductor who demanded his fare. Upon the refusal to pay such fare, the conductor took him by the elbow, and led him down the car, and the passenger was expelled without the use of further physical force, subsequently returning to the train and paying his fare. *Held*, that the passenger could not recover for his ejection. *McGhee v. Drisdale* (Ala. 1896), 20 So. Rep. 391.

Ejection—Instructions.—In *Atchison, etc., R. Co. v. Long* (Kan. App. 1897), 47 Pac. Rep. 993, an action by a passenger against a railway company to recover for ejection from the train, it was *held* that an instruction predicated upon the theory that a ticket was from Topeka to Reading could not aid the jury when they find that the ticket was in fact from Topeka to Emporia.

Ejection—Exemplary Damages.—Where a passenger is forcibly evicted by the agents of the railroad company from its train upon which he has a legal right to re-

main, and where the jury find that the said agents, in the examination of the ticket presented by the passenger, and in evicting him from the train, are grossly and wantonly negligent of the rights of such passenger, they may award exemplary damages. *Atchison, etc., R. Co. v. Long* (Kan. App. 1897), 47 Pac. Rep. 993.

Failure to Stop at Station.—It is the duty of one who desires to become a passenger on a train to ascertain, before boarding it, that it stops at the station to which he desires to go, and if he fails to do so, he cannot recover damages for the refusal to stop the train at a station at which it is not scheduled to stop. *Louisville, etc., R. Co. v. Miles* (Ky. 1896), 37 S. W. Rep. 486.

Carrying Passenger beyond Station—Damages—Excessive Verdict.—A passenger on a train, who was in a delicate condition, while waiting for change due her from a bill given to the conductor to pay her fare, was carried past her station, and had to walk four hundred yards, on a hot day, and on a rough, rocky road. *Held*, that a verdict for such passenger of \$218 was not excessive. *Louisville, etc., R. Co. v. Guy* (Ky. 1896), 37 S. W. Rep. 1043.

Injuries to Passenger—Testimony of Physician—Hearsay Evidence.—On the trial of an action for the recovery of damages for personal injuries alleged to have been sustained by the plaintiff by reason of the collision of defendant's street cars while the plaintiff was a passenger on one of them, in which action the plaintiff's allegation of negligence resulting in such injuries was denied by the defendant, the plaintiff's attending physician was permitted, against objection, to testify that, four or five days after the time of such injury, the plaintiff stated to him "that he was sitting in the back part of the car, and did not see this other car that came in collision with this one until it was almost onto them; and that he

rose, and grabbed hold of a window, or the side of a window, and just at that time the car struck and wrenched him around, and threw him partly on the floor and partly on the opposite side of the car." *Held error.* *Webber v. St. Paul City Ry. Co.*, (Minn. 1897), 69 N. W. Rep. 716.

Injuries to Passenger—Negligence—Proximate Cause.—In *Gulf, etc., Ry. Co. v. Rowland*, (Tex. 1897), 38 S. W. Rep. 756, an action brought to recover for injuries received by a passenger through the moving of the train as he was alighting, the plaintiff alleging the defendant's negligence in starting the train suddenly, and the defendant alleging the plaintiff's negligence in jumping from a moving train, *GAINES, C. J.*, in delivering the opinion of the court said: "'Proximate cause,' literally, means the cause nearest to the effect produced, but in legal terminology the terms are not confined to their literal meaning. Though a negligent act or omission be removed from the injury by intermediate causes and effects, yet, if the party guilty ought reasonably to have foreseen the ultimate consequence, such negligence is deemed in law the proximate cause of the injurious effect. The specific defense of contributory negligence was, as we have seen, that the plaintiff 'jumped from the train' while in motion. If he did so jump, and he was thereby injured, his act was the immediate cause of his injury, and hence there was no question of proximate cause involved in that issue. Yet the instructions which we have quoted lay paramount stress upon the question of proximate cause in reference to the negligence of the plaintiff as charged in the answer, and present that question, in a pointed manner, in every possible phase of the case. The jury are told, distinctly, not only that if he was negligent, and his negligence was the proximate cause of

the injury, he could not recover, but also that, if negligent, and his negligence was not the proximate cause of his injury, he could recover, provided the defendant was negligent as alleged in the petition. The instructions presented a question not made by the pleading and evidence, and their only effect, in our opinion, was to confuse and mislead the jury. We have recently held, in a very similar case, that such instructions are erroneous, and require a reversal of the judgment, and we are still of that opinion. *Railway Co. v. McCoy* (Tex. Sup.) 38 S. W. 36. The testimony was in sharp conflict as to the plaintiff's negligence, and, therefore, we cannot say that the jury were not misled by the charge. We, therefore, think that the judgment ought to be reversed."

Regulations—Reasonableness—Question for the Court.—The reasonableness of regulations prescribed by railroad corporations for the safety, comfort, and conduct of its passengers, and for the proper management of its business, are questions for the courts to decide. *Gregory v. Chicago, etc., Ry. Co.*, (Iowa, 1896), 69 N. W. Rep. 532.

Riding on Platform—Instructions.—In an action against a railway company to recover for the death of a passenger killed while riding on the platform of a car, where the testimony as to whether there were seats or standing room in the cars for him was conflicting, it was not error to refuse to instruct that if there were seats or standing room in the cars for the deceased, and, if he had been on the inside, he would not have been injured, that he was guilty of contributory negligence, and could not recover. *Chesapeake, etc., Ry. Co. v. Lang's Adm'r*, (Ky. 1896), 38 S. W. Rep. 503.

Riding on Platform of Crowded Excursion Train—Negligence.—Where, by cheap rates, persons

are invited upon, and their passage accepted to travel on excursion trains, a person who rides on the platform of such a train when it is crowded is not necessarily negligent. *Chesapeake, etc., Ry. Co. v. Lang's Ad'mr.* (Ky. 1896), 38 S. W. Rep. 503.

Riding on Platform—Contributory Negligence—Instructions.—In an action against a railway company to recover for the death of a passenger killed while riding on the platform of a car where there was evidence that the train, which was an excursion train offering cheap rates, was greatly crowded, the platform being so filled with passengers as to prevent persons on the ground from entering the cars, an instruction that if, from the testimony, there was room in any car for the deceased, and that he could have entered the same, and that he remained on the platform, where he was injured, without the knowledge of the conductor, or against his objection, or that of any agent of the company, the verdict should be for the defendant, was more favorable to the defense than it should have been upon the facts. *Chesapeake, etc., Ry. Co. v. Lang's Adm'r.* (Ky. 1896), 38 S. W. Rep. 503.

Army Transportation — Rate Fixed by Congress—Presumption as to Reasonableness.—In *Atlantic, etc., R. Co. v. United States*, (1896), 76 Fed. Rep. 186, it was *held*, that the presumption that a rate fixed by congress for army transportation is reasonable cannot be overcome, except by some showing of figures and other facts as to the expenses and receipts of the road, during an adequate period.

Railway Company—Right of Government to Fix Charges—Construction of Charter.—By the provision in the charter granted by congress to a railway corporation that the directors "shall, from time to time, fix, determine, and regulate the fares, tolls, and

charges to be received and paid for transportation of persons and property," the government did not renunciate its right to reasonably limit the charges for transportation of persons and property over such railroad. *Atlantic, etc., R. Co. v. United States*, (1896), 76 Fed. Rep. 186.

Right of Congress to Fix Railway Charges—Construction of Charter.—The imposition by congress of the restriction in the charter of a railway company "that the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service," did not preclude further regulations of the rates and charges of such company by congress. *Atlantic, etc., R. Co. v. United States*, (1896), 76 Fed. Rep. 186.

Power of Congress to Fix Railway Rates—Construction of Charter.—Under the provision in the charter of a railway company that "congress may, at any time, having due regard for the rights of said" company, "add to, alter, amend, or repeal this act," congress has the right, within reasonable limits, to regulate the rate of charges fixed by the directors of such company, and the provisions of an act prescribing a maximum charge for government transportation, although of general application, are a legitimate exercise of such reserved powers. *Atlantic, etc., R. Co. v. United States*, (1896), 76 Fed. Rep. 186.

Power of Congress to Fix Railway Charges—Construction of Charter.—The provision in the charter of a railway company that the railroad "shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such other regulations as congress may impose restricting the charges for such government transportation" does not imply a surrender by the government of

its power of regulating the rates and charges in ordinary cases, *Atlantic, etc., R. Co. v. United States*, (1896), 76 Fed. Rep. 186.

Transportation of Post-Office Inspectors—Waiver of Claim for Compensation.—A railroad company which has, upon the demand of the post-office department, furnished free transportation to post-office inspectors for more than six years without disputing the validity of the demand but with entire acquiescence in it, and has during that time claimed and been awarded compensation for certain services in connection with the mails, and has failed to include any charge or claim for such transportation, will be held to have waived any right to demand payment for such transportation. *Central Pac. R. Co. v. United States*, (U. S. 1896), 17 Sup. Ct. 35.

4. CONTRACTS.

Building Contract—Construction of Contracts—Expert Testimony.—In *Clayton Electric Co. v. McKeesport, etc., Ry. Co.*, (Pa. 1897), 36 Atl. Rep. 287, where the plaintiffs contracted to furnish the materials for, with the exception of the ties, and build in a good, substantial and workmanlike manner, an electric railway, over and upon a roadbed excavated and prepared by the defendant, and to deliver it to the defendant complete and ready for operation, it was *held* error to refuse to allow the defendant to introduce expert testimony to show the meaning of the words "excavated and prepared," as applied to the roadbed, and used in the contract, in order to determine whose duty it was to ballast such road.

Contract for Hauling—Uncertainty—Action for Breach.—A contract whereby a railway company agreed to put in a side track for the exclusive use and benefit of the owner of a sand pit and to

haul his sand at an agreed rate per ton is void for uncertainty as to time, not legally enforceable and determinable at the will of either party, and an action for damages for the breach of such contract will not lie. *Baldwin v. Kansas City, etc., R. Co.*, (Ala. 1896), 20 So. Rep. 349.

5. CROSSINGS.

Accident at Crossing—Appeal—Review.—In case of a personal injury by a collision with a locomotive engine and train at a highway crossing, where the answers of the jury to particular questions of fact show contributory negligence on the part of the plaintiff, and the general verdict is for the defendant, and only a part of the evidence is preserved, and no material error appears in the instructions, and the court overrules the plaintiff's motion for a new trial, and renders judgment on the verdict, *held*, that such judgment should be affirmed, although the defendant may not have been free from fault. *Lawrence v. Atchison, etc., R. Co.*, (Kan. 1897), 47 Pac. Rep. 510.

Accident at Crossing—Obstruction of View—Evidence of Negligence.—In an action against a railway company to recover for personal injuries received at a crossing through the alleged negligence of the defendant in failing to give the proper signals it was *held* proper to show that a bank existed on the right of way of a railway company, and that it interfered with the view of an approaching train in order to show the entire situation at the time of the accident as bearing upon the negligence alleged, but not as a separate ground of negligence. *Leitch v. Chicago, etc., Ry. Co.*, (Wis. 1896), 67 N. W. Rep. 21.

Accident at Crossing—Negligence.—An electric car was stopped at a railway crossing to al-

low a train to pass. After the train had passed the motorman on the front platform of the car signaled the conductor on the rear platform that the track was clear, and the conductor signaled him to go ahead. The car was run upon the crossing, and was struck by a train which could have been seen by either the motorman or conductor, at the point where the car stopped, when 275 yards away, and the conductor was injured. *Held*, that the conductor was guilty of such contributory negligence as to prevent recovery for his injuries. *Highland Ave., etc., Co. v. Fennell*, (Ala. 1896). 21 So. Rep. 324.

Accident at Crossing—Contributory Negligence.—A motorman on approaching a railway crossing stopped his car forty feet from the crossing at a point from which an approaching train could be seen when 567 feet away, the track being visible for that distance from such point up to a point ten feet from the crossing and looked and listened, but saw no train. He then proceeded without looking again until within five or six feet of the crossing when he saw a train two hundred feet away, and attempting to cross before it, his car was struck, and he was injured. *Held*, that there was such contributory negligence on his part as to prevent recovery for his injuries. *Vreeland v. Cincinnati, etc., R. Co.*, (Mich. 1896), 67 N. W. Rep. 905.

Accident at Crossing—Contributory Negligence.—A person familiar with the tracks at a crossing and with the schedule of the trains of the railway company approached the crossing and saw a train standing near which he knew was waiting for a train from the opposite direction to pass, and he knew that the latter train was due. Before crossing the track he looked for the latter train and failed to see it owing to obstructions, but did not stop and look from a point nearer the

main track nor on the side track, from either of which places his view of the main track would have been unobstructed, and was struck and injured by the incoming train as he was attempting to cross the main track. *Held*, that he was guilty of such contributory negligence as to prevent recovery for his injuries.

Accident at Crossing—Contributory Negligence.—A person who was familiar with a crossing stopped as he was approaching it, at a point some distance from the crossing, from which only a portion of the track could be seen, and then drove on without stopping at a point nearer the crossing, from which an approaching train could have been seen before it reached the crossing, and was struck and injured by a train as he was attempting to cross. *Held*, that he was guilty of such contributory negligence as to prevent recovery for such injuries. *Washington Southern Ry. Co. v. Lacey*, (Va. 1897), 26 S. E. Rep. 834.

Accident at Crossing—Contributory Negligence.—Just after the passage of a train past a crossing on the nearer of two parallel railroad tracks, and while there was smoke and dust about caused by such train, a person attempted to cross the tracks, and was struck and killed by a train approaching on the further track from the opposite direction. *Held*, that he was guilty of contributory negligence, and there could be no recovery for his death. *Hovenden v. Pennsylvania R. Co.*, (Pa. 1897), 36 Atl. Rep. 731.

Accident at Crossing—Contributory Negligence—Instructions.—In an action against a railway company to recover for injuries received at a crossing, it is not error to refuse to instruct that though the plaintiff looked and listened, and did not see or hear the approaching train, yet, if he might have done so, it is contributory negligence. *Mayes v. Southern*

Ry. Co., (N. C. 1896), 26 S. E. Rep. 148.

Accident at Crossing—Contributory Negligence—Instructions.—In an action against a railway company to recover damages for personal injuries, an instruction that "if the defendant company relies upon contributory negligence of the plaintiff as a defense to this action, the burden of proof is upon the defendant company to establish such contributory negligence of the plaintiff by a preponderance of testimony" is not prejudicial where a subsequent instruction is given that if the jury believe that the plaintiff so far contributed to the accident by his own negligence, that, but for his negligence, it would not have happened, he cannot recover. *Washington Southern Ry. Co. v. Lacey*, (Va. 1897), 26 S. E. Rep. 834.

Accident at Crossing—Contributory Negligence—Instructions.—In an action against a railway company to recover for injuries received at a crossing, where the court, in its charge, has stated the duty of the plaintiff to stop, look, and listen before attempting to cross, it is not error to refuse to give an instruction that, though the defendant was running its train (backward, on a dark night) at an excessive speed, and without ringing the bell, and without a light on the front end of the leading car, still, if the plaintiff could have avoided the injury by the use of reasonable care, the jury should find him guilty of contributory negligence. *Mayes v. Southern Ry. Co.*, (N. C. 1896), 26 S. E. Rep. 148.

Construction and Maintenance.—A state statute, which requires that all railway companies shall build, or cause to be built, and kept in repair, good and sufficient crossings at all points where public highways may be intersected by railway lines, is applicable to a case where, in the course of construction of a railway, a stream of water has been turned from its

natural channel into an artificial one, wholly upon the right of way, and has, by reason thereof, made it necessary for the company to build a bridge over the stream, as a part of an approach or highway crossing of the railway tracks. If the bridge is necessarily a part of the approach or crossing, it must be built and kept in repair by the railway company. *Board of Com'rs, etc., v. Duluth, etc., R. Co.*, (Minn. 1897), 69 N. W. Rep. 898.

6. DEATH BY WRONGFUL ACT.

Killing of Passenger—Measure of Damages—Instructions.—In an action against a railway company to recover for the death of a passenger, it was held, that the earning power of the deceased extended to the probable duration of his life was the measure of damages, and that instructions as to the measure of damages that authorized the jury to consider the age of the deceased, his capacity to earn money, and the probable duration of his life were proper. *Chesapeake, etc., Ry. Co. v. Lang's Adm'r* (Ky. 1896), 38 S. W. Rep. 503.

Action for Death by Wrongful Act—Damages.—In *Walker v. Lake Shore, etc., Ry. Co.* (Mich. 1897), 69 N. W. Rep. 1114, an action to recover for death by wrongful act, MONTGOMERY, J., delivering the opinion of the court, said: It has been frequently decided by this court that in an action for the recovery of damages for death by wrongful act, based upon our statute, the damages to be awarded must be limited to the pecuniary loss sustained by those in whose interest the case is prosecuted. *Railway Co. v. Bayfield*, 37 Mich. 214; *Balch v. Railroad Co.* 67 Mich. 394, 34 N. W. 884; *Mynning v. Railway Co.*, 59 Mich. 261, 26 N. W. 514; *Van Brunt v. Railroad Co.*, 78 Mich. 530, 44 N. W. 321; *Nelson v. Railway Co.*

(Mich.), 62 N. W. 993. In our former opinion in this case we said: "We are aware that some courts have held that the jury may take into account the loss sustained by the children of the deceased for loss of physical care and mental and moral training of the father or mother, and we are not prepared to say that cases may not arise in which there may be sufficient proof of damages suffered by reason of the withdrawal of these ministrations which will justify a recovery upon that basis. But it is distinctly against the previous holdings of this court to say that such elements may be considered, and the jury left to roam at large, and draw upon their imagination as to the extent of the injury suffered through this cause." On the second trial there was no evidence of the value of deceased's instruction given to his children, nor of the value of any physical, moral, or intellectual training, nor could there well have been. It was not claimed that deceased was in any sense a tutor to his children. The most that can be inferred is that he rendered to them occasional assistance, such as a parent is supposed to render to his children, but which, in its very nature, is as incapable of measurement by a pecuniary standard as is the loss of love, affection, and sympathy. See *Railroad Co. v. Austin*, 69 Ill. 426; *State v. Baltimore & O. R. Co.*, 24 Md. 106. The rulings conflict with our former opinion, and cannot be sustained.

Right of Widow to Maintain Action for Wrongful Death.—Where a state statute provides that, "Whenever death shall be occasioned by unlawful violence or negligence, and no suit of damages be brought by the party injured during his or her life, the widow of any such deceased..... may maintain an action for and recover damages for the death," one who was married to a man after he was injured, and before

his death, may recover damages for such death. *Gross v. Electric Traction Co.* (Pa. 1897), 36 Atl. Rep. 424.

7. EMINENT DOMAIN.

Condemnation of Land—Award—Just Compensation—Payment or Security—Constitutionality of Statute.—Where the constitution of a state provides that just compensation shall be made to the owner for all property taken, injured, or destroyed by any corporation, "which compensation shall be paid or secured before the taking, injury, or destruction shall be permitted," a state statute authorizing a railway company desiring to cross a turnpike, when an appeal has been taken from the award of viewers by the owner of the turnpike, to pay into court the amount of the unsatisfactory award, and thereupon to build and use the desired crossing of the appellant, is unconstitutional as undertaking to confer an absolute right on such company to injure the property of the turnpike company by its crossing, without payment or security for the payment of a just compensation, as it may be finally ascertained upon the disposition of the appeal. *Harrisburg, etc., Turnpike Road Co. v. Harrisburg, etc., Ry. Co.* (Pa. 1896), 35 Atl. Rep. 850.

Discontinuance of Condemnation Proceedings—Recovery of Expenses of Litigation.—Where a railway company having proceeded, by due course of law, to have condemned for the uses of its road a right of way through the lands of the plaintiff, discontinued the proceedings when the commissioners were about to make their report, the plaintiff cannot recover for counsel fees and other expenses incurred by him in such proceedings. *Andrus v. Bay Creek Ry. Co.* (N. J. 1897), 36 Atl. Rep. 826.

8. FIRES.

Fires Set by Locomotives—Injuries to Realty—Trees—Pleading.

—A petition which alleges that the plaintiff was the owner of certain lands particularly described, upon which there were standing and growing certain fruit, shade, and ornamental trees, shrubs, and vines, also particularly described, and that the defendant negligently permitted fire to escape from its locomotive, which spread, burned and destroyed such trees, shrubs, and vines, alleges an injury to the freehold. Trees growing on the land of the owner, for fruit, shade, or ornament, are part of the realty; and no other facts than these need be stated in the petition to show that they are such. *Missouri, etc., Ry. Co. v. Lycan* (Kan. 1897), 47 Pac. Rep. 526.

Fires Set by Locomotives—Liability of Railway Company.—In an action against a railway company to recover damages for negligently permitting fire to escape from one of its locomotives, where it is alleged that the defendant was negligent in failing to provide such locomotive with a sufficient spark arrester, and in the manner of operating its engine, and also in that it negligently permitted tall grass, weeds, and other combustible material to remain on its right of way, *held*, that a finding of negligence in not burning off the right of way, based on sufficient evidence showing that the fire started in and spread from such grass and weeds, will support a general verdict for the plaintiff, notwithstanding findings in favor of the company on the other charges of negligence. *Missouri, etc., Ry. Co. v. Lycan* (Kan. 1897), 47 Pac. Rep. 526.

Fires Set by Locomotives—Damages.—In an action against a railway company to recover for damages to trees through fire set by a locomotive of the defendant company, evidence as to the value of

the trees while growing on the land, and as a part of it, is competent for the purpose of showing the amount of the plaintiff's damages. Where a particular thing attached to the soil, and therefore a part of the realty, but which has a distinct value as such, susceptible of definite measurement, is injured or destroyed the evidence in an action to recover damages therefor may properly be directed to the value of such specific thing as a part of the land, and, in actions of this kind, is ordinarily the best and most satisfactory evidence. It is only where the damages to one part of the land affect other parts, and are incapable of more definite and direct proof, that the evidence is necessarily confined to proof of the value of the whole tract before and after the injury, though the actual damages can never, in any case, exceed the difference between such values. *Missouri, etc., Ry. Co. v. Lycan*, (Kan. 1897), 47 Pac. Rep. 526.

9. HIGHWAYS.

Obstruction of Highway by Railway Company—Damages—Right of Individual to Recover.—A fence was erected by a railway company across a road which crossed its railway. Prior to the erection of such fence the plaintiff had contracted to haul dirt for parties on the opposite side of the railway at an agreed price per load. The road which was obstructed was the natural route for such hauling, and by the road which the plaintiff was obliged to take after the erection of the fence it took three times as long to deliver a load as it had by the obstructed road. *Held*, that he had sustained such damage in consequence of the obstruction as would support an action against the company for damages. *Knowles v. Pennsylvania R. Co.*, (Pa. 1896), 34 Atl. Rep. 974.

Duty of Railway Company to Restore Highway.—The failure of a railway company to remove a natural hill through the base of which its track was laid in a cut, thus causing a bank which obstructed the view of the track by travelers approaching on a highway, crossing the railway near such cut, but which was entirely outside of the highway, was not a failure to restore the highway to its former condition of usefulness as required by sec. 1836, Rev. St. Wis. *Leitch v. Chicago, etc., Ry. Co.*, (Wis. 1896), 67 N. W. Rep. 21.

Railroads in Streets—Ordinance Regulating Speed—Reasonableness.—An ordinance of a city which provides that it shall not be lawful for an engine or car to be run in the city at a greater rate of speed than five miles per hour, and that every engine run in the city shall be furnished with a bell of not less than 30 pounds weight, which shall be rung during the entire time the locomotive is in motion within the city limits, is not unreasonable. *Washington Southern Ry. Co. v. Lacey*, (Va. 1897), 29 S. E. Rep. 834.

Railroads in Streets—Reciprocal Duties of Company and Travelers in the Streets—Instructions.—In an action against a railway company to recover damages for injuries received at a street crossing an instruction that "the plaintiff had the lawful right to cross Fayette street at any part thereof" is not misleading where there is a subsequent instruction given that "at the crossing of a railroad and highway the rights and obligations of the railroad company and travelers on the highway are reciprocal; but it is the privilege of the company that its trains shall have the right of way, and that all persons on the highway shall yield precedence to the trains." *Washington Southern Ry. Co. v. Lacey*, (Va. 1897), 26 S. E. Rep. 834.

Railroads in Streets—Speed in Excess of Ordinance—Negligence.

—In an action against a railway company to recover damages for injuries received at a street crossing, where there was evidence that the train was running at a rate of speed from four to six times as great as that allowed by the city ordinance, and gave no signal of its approach to such crossing, the jury was justified in finding that the defendant was guilty of negligence in the management of its train. *Washington Southern Ry. Co. v. Lacey*, (Va. 1897), 26 S. E. Rep. 834.

10. MASTER AND SERVANT.

Contributory Negligence—Evidence.—In an action against a railway company to recover damages for the death of an employee, where the deceased could have seen the train by which he was killed for a mile before it reached him, and could have heard its approach in time to have avoided injury, and there is no evidence that he did or did not look or listen for or hear the train in time nor any facts showing that he was in the exercise of ordinary care and without fault when killed, his freedom from contributory negligence is not shown sufficiently to entitle a recovery to be had for his death. *Fisher v. Louisville, etc., Ry. Co.*, (Ind. 1897), 45 N. E. Rep. 689.

Contributory Negligence—Complaint—Sufficiency.—In an action by an employee against a railway company to recover for injuries alleged to have been caused by negligence of the defendant in the use of a defective coupling link, the complaint alleged that the defect in the coupling was patent and open to the inspection of defendant if an examination had been made, and that the defendant knew of such defect, or might have known by proper inspection, and that the plaintiff was wholly ignorant of the defective condition of the same. *Held*, that such

complaint was not insufficient as showing contributory negligence on the part of the plaintiff. *Louisville, etc., Ry. Co. v. Howell*, (Ind. 1896), 45 N. E. Rep. 584.

Contributory Negligence—Voluntary Assumption of Risk—Instructions.—In an action to recover damages of a railway company for injuries to an employee resulting in his death, where the court submitted the issue to the jury as to whether the deceased contributed to his death by his own negligence, it was not error to refuse to submit an issue as to whether he voluntarily took a risk which he knew to be dangerous. *Rittenhouse v. Wilmington St. Ry. Co.* (N. C. 1897), 26 S. E. Rep. 922.

Assumption of Risk.—In *Lee v. Chesapeake, etc., R. Co.* (Ky. 1897), 38 S. W. Rep. 509, an action by an employee to recover for personal injuries, it appeared that in replacing cross-ties at a switch, it became necessary to move some of them, three persons being assigned to each tie, that one tie had been carried, and the plaintiff and two other employees had started with the second tie, when one of such employees announced his inability to carry his share, and the foreman, a stout man, took his place; that as they were carrying the tie, the ground being uneven, the foreman stumbled and fell, causing the plaintiff to fall, and the tie fell upon his leg and broke it. *Held*, that the plaintiff assumed the risk, and that the defendant was not liable for his injuries.

Assumption of Risk.—When a servant enters into the employment of a master, he assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise. *Reese v. Wheeling, etc., R. Co.* (W. Va. 1896), 26 S. E. Rep. 204.

Assumption of Risk.—When a servant willfully encounters dangers which are known to him, the master is not responsible for an injury occasioned thereby. *Reese*

v. Wheeling, etc., R. Co. (W. Va. 1896), 26 S. E. Rep. 204.

Assumption of Risk.—An employer does not impliedly guaranty the absolute safety of his employees. In accepting an employment, the latter is assumed to have notice of all patent risks incidental thereto, or of which he is informed, or of which it is his duty to inform himself; and he is also assumed to undertake to run such risks. *Reese v. Wheeling, etc., R. Co.*, (W. Va. 1896), 26 S. E. Rep. 204.

Assumption of Risk.—In *Oliver v. Ohio River R. Co.*, (W. Va. 1896), 26 S. E. Rep. 444, an action brought against a railway company to recover for injuries received by an employee while engaged in coupling cars, it was *held*, that where an employee of a railroad company has knowledge of any danger connected with his employment which may be avoided by the use of ordinary care, and appreciates the danger to which he exposes himself, if he continues in such employment after such knowledge, without protest or complaint on his part, or promise on the part of such railroad company that such danger shall be removed, he will be held to have assumed the risk of such danger, and to have waived all claims for damages in case of injury.

Assumption of Risk.—In *Oliver v. Ohio River R. Co.*, (W. Va. 1896), 26 S. E. Rep. 444, an action brought against a railway company to recover for injuries received by an employee while engaged in coupling cars, it was *held*, that when a servant enters into the employment of a master, he assumes all of the ordinary risks incident to his employment, whether the employment is dangerous or otherwise; and if a servant willfully encounters dangers which are known to him, or are notorious, the master is not responsible for any injury occasioned thereby.

Measure of Master's Duty.—In *Oliver v. Ohio River R. Co.*, (W. Va. 1896), 26 S. E. Rep. 444, an action brought against a railway company to recover for injuries received by an employee while engaged in coupling cars, it was *held*, that the measure of a master's duty to his servant is reasonable care, having relation to the parties, the business in which they are engaged, and the exigencies which require vigilance and attention. He is not a guarantor of the safety of his servant.

Duty of Master—Rules—Competent Servants.—In *Oliver v. Ohio River R. Co.*, (W. Va. 1896), 26 S. E. Rep. 444, an action brought against a railway company to recover for injuries received by an employee while engaged in coupling cars, it was *held*, that the master's duty is to make and promulgate proper rules. It is not required that the master should see to it, personally, that notice comes to the knowledge of all those to be governed thereby. If there is due care and diligence in choosing competent servants to receive and transmit the necessary orders, the negligence by them in performing is a risk of the employment that the co-employee takes when he enters the service.

Violation of Orders.—In *Rittenhouse v. Wilmington St. Ry. Co.*, (N. C. 1897), 26 S. E. Rep. 922, the court said: "It is settled law that a servant cannot recover where his violation of his master's orders contributed to the injury."

Fellow Servants—Defense—State Statute—Effect.—A state statute providing that in actions against a railroad company for death or injuries sustained by an employee the negligence of a fellow servant shall not be a defense, is not retroactive. *Rittenhouse v. Wilmington St. Ry. Co.*, (N. C. 1897), 26 S. E. Rep. 922.

Vice-Principal—Conductor and Brakeman—Negligence.—In *Purcell v. Southern Ry. Co.*, (N. C. 1896), 26 S. E. Rep. 161, where a

brakeman sought to recover for injuries received through the conductor of train having, without the plaintiff's knowledge and without having warned him, performed the latter's duty in uncoupling certain cars, *AVERY, J.*, delivering the opinion of the court, said: "The conductor, while in charge of an independent train, was a vice-principal, and his acts were, in contemplation of law, the acts of the railway company. *Mason v. Railway Co.*, 111 N. C. 482, 16 S. E. 698; *Turner v. Lumber Co.* (at this term) 26 S. E. 23. Strangers are warranted in assuming that the servants of a railway company will discharge their respective duties, and are not negligent in acting on that assumption. *Tillett v. Railroad Co.*, 118 N. C. 1031, 24 S. E. 111. The servants themselves have the right to expect and demand that reasonable care be exercised by the company in providing for their protection. *Mason v. Railroad Co.*, *supra*; *Chesson v. Lumber Co.*, 118 N. C. 65, 23 S. E. 925. The conductor, who was the embodiment of the authority of the company, was negligent in ordering any movement of the train without warning to the plaintiff, if he had reasonable ground to apprehend that, without such caution, the plaintiff, acting within the scope of his ordinary duties, might be subjected to danger from such movement. *Little v. Railroad Co.*, 118 N. C. 1078, 24 S. E. 514; *Blue v. Railroad Co.*, 116 N. C. 955, 21 S. E. 299; *Emry v. Railroad Co.*, 102 N. C. 209, 9 S. E. 139; *Tillett v. Railroad Co.*, 118 N. C. 1031, 24 S. E. 111; *Turner v. Lumber Co.*, *supra*.

"Though there is conflict in the testimony as to the question whether the conductor was in the habit of taking the place of the brakeman by uncoupling cars, it was not disputed that it was a duty which the brakeman was accustomed to perform, and which he was justified in assuming devolved upon him when he was in-

jured. The plaintiff was not negligent in preparing in the usual way to uncouple the cars, and in subjecting himself only to such danger as he knew to be incident to discharging that duty. If the conductor knew that the plaintiff usually descended from the top of the cars for that purpose, and in doing so necessarily placed himself in a perilous position, he was culpable, if he anticipated his subordinate, and, without warning to him, or in any way looking to his safety, ordered the car to be moved suddenly forward; and by such carelessness he subjected the company to liability for any damage that might have reasonably been expected to ensue from his omission to give such warning, and that might have been averted by giving it."

Vice-Principal — Instructions. — Where a brakeman in the employ of a railway company was injured through the action of a conductor in uncoupling cars, without the plaintiff's knowledge, which it was the plaintiff's duty to uncouple, an instruction in an action to recover for such injuries, that the conductor could change his own relation to the company from that of *alter ego* to that of a fellow servant of a brakeman by volunteering to anticipate the plaintiff in the performance of his ordinary duty, is not prejudicial to the defendant. *Purcell v. Southern Ry. Co.*, (N. C. 1896), 26 S. E. Rep. 161.

Fellow Servants—Track Foreman and Motorman. — A track foreman in the employ of a street railway company who has charge of, and is responsible for, the condition of its tracks is the fellow servant of a motorman of such company. *Rittenhouse v. Wilmington St. Ry. Co.*, (N. C. 1897), 26 S. E. Rep. 922.

Negligence. — In an action against a railway company to recover for the death of an employee, it appeared that the deceased was a section hand in the employ of the defendant and was at place

from which the approaching train could have been seen when a mile away; that the engineer and fireman could have seen him when the train was half a mile off; that no danger signals were given; that he could have heard the noise of the approaching train in time to have avoided injury. There was no evidence as to what he was doing, whether he saw or heard the approaching train, whether he looked and listened far, nor that he was seen by the engineer or fireman. *Held*, that it could not be found, as a matter of law, that his injuries were willfully and purposely caused, nor that they were caused by the defendant's negligence. *Fisher v. Louisville, etc., Ry. Co.* (Ind. 1897), 45 N. E. Rep. 689.

Negligence. — In an action against a railway company to recover for the death of an employee, where the plaintiff contends that the accident was due to the negligence of the engineer in stopping the train before he was signaled to do so, causing the deceased to fall from the car, but fails to show whether the accident was due to that or some other cause, no recovery can be had. *De Whirst v. Boston, etc., R. Co.*, (Mass. 1897), 45 N. E. Rep. 758.

Negligence—Proximate Cause. — Where an employee of a railroad company is being carried on a construction train to his home from his work by the railroad company, without any agreement or compensation therefor, and voluntarily takes a position standing on a small truck which is being pushed forward by the engine, contrary to repeated warnings of those in charge of the train as to the danger of so doing, and he is injured by reason of the derailment of the truck, if his riding in that position is the proximate cause of his injury, the railroad company is not responsible for his injuries thereby occasioned. *Reese v. Wheeling,*

etc., R. Co., (W. Va. 1896), 26 S. E. Rep. 204.

Negligence—Evidence—Nonsuit.—In an action against a railway company to recover for the killing of an employee, where the only fact appearing from the evidence is that a lump of coal was thrown from the tender of an engine and struck and killed the employee, a roadbed and track repairer, engaged in the performance of his duties, a judgment of nonsuit was properly granted, as there was nothing to show negligence on the part of the defendant. *Anderson v. Union Pac., etc., R. Co.,* (Colo. 1896), 46 Pac. Rep. 840.

Defective Cars—Notice.—A railroad company, having had transient cars of other companies in its use or employment regularly inspected, condemned, and ordered to be sent to its shops for repairs, and had them properly tagged so as to warn its employees of that fact, has not fully discharged its obligation of due care towards one engaged in the performance of night service as a car coupler unless the tags are of such a size and character as to bring the condemnation of the cars to his attention, or he is otherwise informed of the fact. *Meyers v. Illinois Cent. R. Co.,* (La. 1896), 21 So. Rep. 120.

Defective Appliances.—In an action by a brakeman against a railway company to recover for injuries alleged to have been caused by negligence of the defendant in the use of a defective coupling link, it appeared that the two cars between which was the defective link were, by the defendant's order, taken into the train, so coupled together, between 11 and 12 o'clock at night, at a station at which there was a train inspector, that the train only stopped long enough to take them in, and that such defect could have been discovered by the defendant by the exercise of proper care. *Held*, that the

plaintiff was entitled to recover. *Louisville, etc., Ry. Co. v. Howell,* (Ind. 1896), 45 N. E. Rep. 584.

Defective Appliances.—In an action by an employee against a railway company to recover for injuries alleged to have been caused by negligence of the defendant in the use of a defective coupling link, the court said, "Even if the link were an appliance which appellee had used, he would not be required to inspect it to see whether or not there were latent defects in or about it, still less when he had no occasion to use it or to know anything of its condition. He had a right to assume that his employer had furnished an engine and cars, the appliances of which were in a reasonably safe condition. He was not required to make 'a careful examination and inspection for the purpose' of seeing whether this duty had been performed." *Louisville, etc., Ry. Co. v. Howell,* (Ind. 1896), 45 N. E. Rep. 584.

Evidence.—G. was engaged as an employee of the defendant in an ash pit cleaning an engine. When the engine was moved off, his head was caught and crushed between a bolt head protruding from the heel of the pilot and a plate on the end wall of the pit. One witness for the plaintiff testified that he was first struck by the shaker bar, and another, by the links under the engine. The jury found that he was first struck by the ash pan, though no witness so testified in terms. It was shown by other testimony that the shaker bar on this particular engine was inside the ash pan, though on some other engines the shaker bars were outside. *Held*, that the jury were warranted, on consideration of all the testimony in the case, in finding that the ash pan was the first thing that struck G., and knocked him against the wall of the pit. *Atchison, etc., R. Co. v. Green,* (Kan. 1897), 47 Pac. Rep. 514.

11. MISCELLANEOUS.

Bill for Specific Performance—Pleading.—The plaintiff railway company files a bill for the specific performance of a verbal agreement made by defendants' ancestor to sell and convey in fee a certain strip of land for a railroad track, and alleges that the purchase money was paid, possession was taken, the track was made, and is now used, praying for a conveyance. One defendant answers, admitting the sale, the payment of the purchase money, the taking of possession, and the present occupancy thereof by plaintiff, and defendant claims no right therein except an under-grade private crossing, and defendant alleges in his answer, by way of cross bill, that defendants' ancestor had executed to the S. V. Ry. Co., plaintiff's vendor, a deed of conveyance to said land, and delivered the same to B., the vice-president of said S. V. Ry. Co., and a director in the plaintiff company, but that his ancestor had excepted from said conveyance, and had expressly reserved therein, to himself forever, said right of way, and that said B. was living, and a resident of an adjoining county in the state of Virginia, and prays the court to require the plaintiff to produce this deed, thus traced into the hands of one of its officers, or to require said officer to account for it. Such new matter constitutes a claim for affirmative relief in this suit. Such deed is necessary as a muniment of title to defendant's right of way, and the production thereof prayed for is necessary in aid of defendant's defense to the original bill, and there is no other plain, adequate, and complete remedy for giving full and complete relief, and thus ending the litigation. If the plaintiff had failed or refused to file a special reply in writing to such answer by way of cross bill, the statute required the allega-

tions to be taken as true, and no proof thereof to be required. But plaintiff tendered to be filed such special reply in writing, but the court refused to permit the same to be filed, and dissolved the injunction. Such refusal to permit the special reply to be filed was erroneous, and consequently it was error to dissolve the injunction. *Norfolk, etc., R. Co. v. McGarry* (W. Va. 1896), 26 S. E. Rep. 297.

Change of Depot Grounds—Depreciation of Property—Damages.—A state statute prohibiting any railway company from changing its depot grounds after they are once located does not give a right of action to a person owning property contiguous to the depot grounds of a railway company for damages for the depreciation in value of such property caused by the changing of the depot grounds of such company. *Missouri, etc., Ry. Co. v. Colburn* (Tex. 1896), 38 S. W. Rep. 153.

Connection of Roads—Terms—Powers of Jury.—Where a state statute provides that railway companies whose roads are constructed under its provisions shall have the right to connect their roads with roads of a similar kind upon such terms as may be agreed upon, or in case of failure to agree, the terms to be fixed upon by a jury to be appointed by the court of common pleas in whose jurisdiction the connection is to be made, upon the application of either party, it was *held* beyond the power of such jury to order one of the parties to transfer to the other its lands, right of way, station, yards, water, joint control of part of its road, or other valuable property or franchise, but that their only function is to determine matters relating solely to the physical connection of such roads. *Altoona, etc., R. Co. v. Beech Creek R. Co.*, (Pa. 1896), 35 Atl. Rep. 734.

Dangerous Premises—Personal Injuries—Contributory Negli-

gence.—A person entered a freight house to which there was no step, the door being twenty-two inches above the platform in front of it, and had to pull himself up that distance. On leaving the house, he failed to remember the distance to the platform, and fell and injured himself. *Held*, that he was guilty of such contributory negligence as to prevent recovery for his injuries. *St. Louis, etc., Ry. Co. v. Forbes*, (Ark. 1897), 39 S. W. Rep. 63.

Elevated Railways—Easements of Light and Air—Notice of Possession.—A release by an abutting owner to an elevated railway company of the easements appurtenant to the premises taken or affected by the maintenance and operation of its road effects an abandonment of such owner's easement of light, air and access afforded by the street in front of the premises, and where the road is constructed and operated, such release need not be recorded as against a subsequent grantee of the owner, the open and visible possession of such easements operating as a notice to the grantee of the company's rights. *Wood v. Metropolitan El. Ry. Co.*, (N. Y. 1897), 46 N. E. Rep. 319.

Jurisdiction of State Court—Possession of Property by Federal Court.—The fact that the property of a street railway company is in the possession of a federal court under bills filed therein for the foreclosure of a mortgage on the property of such company, does not defeat the lawful jurisdiction of a state court to hear and determine the question whether such company is indebted to the city for taxes special or general, and to decree the amount thereof. *City of Lincoln v. Lincoln St. Ry. Co.*, (1896), 77 Fed. Rep. 658.

Mechanic's Liens on Railroads—Construction of South Carolina Statute.—In *Greenwood, etc., Ry. v. Strang*, (1896), 77 Fed. Rep. 498, a creditors' bill was filed by a contractor engaged in building a

railroad against the railway company, claiming a sum of money due and unpaid under his contract, which had been secured by the record of a mechanic's lien. The state statute relative to mechanic's liens provided that, "Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used, in the erection, alteration or repair of any building or structure upon any real estate by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from or rightly acting for such owner in procuring or furnishing such labor or materials, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure the payment of the debt so due him, and the costs which may arise in enforcing such lien under this article," (Rev. St. S. C. § 2465). In reference to the question whether a railroad is a building or structure in the meaning of such act, *SIMONTON*, Circuit Judge, said, "In the absence of any decision by the court of last resort of the state of South Carolina on this point, this court must reach its own conclusion. No such case appears in the reports. In *County Com'rs v. Tommey*, 115 U. S. 122, 5 Sup. Ct. 626, 1186, it was held that a law giving mechanics and laborers a lien on buildings, including the land on which they stand, for labor or materials in their construction or repair, should not be extended to railroads, unless there was clear and distinct language in the act including railroads. This was put on the ground of public policy and the interest of the public in railroads as a going concern. Were it otherwise, railroads could be constantly obstructed and their use interrupted, by claims of this character, and the interest of the public in them injured. The

court discusses the law of North Carolina at length, and holds that there is nothing to take the case out of the general rule laid down. The case of *Brooks v. Railway*, 101 U. S. 443, is quoted, and it is shown that case proceeded upon the words of the Iowa statute expressly including 'contractors, sub-contractors, material furnishers, mechanics, and laborers, engaged in the construction of any railroad or other work of internal improvement.' *Meyer v. Hornby*, Id. 728, depends on the same statute of Iowa. *Taylor v. Railway Co.*, 4 Dill. 570, Fed. Cas. No. 13,783, is under the same statute. In *National Foundry & Pipe Works v. Oconto Water Co.*, 52 Fed. 43, affirmed in 7 C. C. A. 603, 59 Fed. 19, the question is made to depend upon the public policy of the state in which the lien is sought to be upheld. After a review of the Wisconsin cases, the court held that the exemption from mechanics' liens enjoyed in that state by public corporations does not extend to *quasi* public corporations, like a waterworks company or a railroad. The public policy of South Carolina in this respect has no distinct expression. In *Watson v. Bridge Co.*, 13 S. C. 434, a mechanic's lien was enforced against the Columbia Bridge Company. The question before the court, however, did not bear in any way on the validity of the lien *per se*. That point was not raised or discussed or even suspected in the case. There may or may not be significance in the language used in the general railroad law (section 1691, Rev. St. S. C.) giving priority to judgments against a railroad for injury to person or property over any mortgage to secure bonds of the company. That section says: 'Said judgment shall relate back to the date when the cause of action arose, and shall be a lien as of that date, of equal force and effect with the lien of employees for wages upon the income, prop-

erty, and franchises of said corporation, enforceable,' etc. It may be that this protection contemplated for employees for wages excludes the idea that the legislature favored any other contractors with railroad companies. The decision in *County Com'rs v. Tommey*, *supra*, seems to control this case, and will be followed."

Obstruction of Navigable River by Railway Bridge—Hindrance to Navigation—Damages—Right of Action.—In *Jones v. St. Paul, etc., Ry. Co.* (Wash. 1896), 47 Pac. Rep. 226, an action brought by the owner of a steamboat to recover for delay in navigating such boat caused by the obstruction of a navigable river by a bridge, *Hovr, C. J.*, delivering the opinion of the court, said: "To show that the facts stated were not sufficient to entitle plaintiff to recover, we cite: *Small v. Railway Co.*, 15 U. C. Q. B. 283; *Cull v. Railway Co.*, 10 Grant (U. C.) 491; *Blackwell v. Railroad Co.*, 122 Mass. 1; *Blood v. Railroad Corp.*, 2 Gray 137; *Brightman v. Inhabitants of Fairhaven*, 7 Gray 271; *Willard v. City of Cambridge*, 3 Allen 574; *Wesson v. Iron Co.*, 13 Allen 95; *Brayton v. City of Fall River*, 113 Mass. 218; *Mayor, etc., of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91. The cases which have held that a private action could be maintained for a public nuisance were based upon facts unlike those alleged in the complaint in this action. In every one which we have examined, with a single exception, the obstruction had not in degree simply, but in kind, affected the plaintiff differently from the general public; and in the excepted case the opinion of the court clearly shows that it held the complaint to be sufficient for the reason that, though it was alleged that the nuisance was a public one, it was also alleged that it had been placed in the stream for the express purpose of injuring the business of the plaintiff. We doubt if a single case

can be found which holds that damages of the kind sued for in this action can be recovered against one who is maintaining a public nuisance. At least, the great weight of authority establishes a contrary doctrine. The judgment will be reversed, and the cause remanded, with instructions to dismiss."

Land Grants—Erroneous Certification—Bona-Fide Purchaser.—When certain land was certified to a state for the benefit of a railway company a portion of it was held by one who had possession under a recorded claim of title. Subsequently the railway company conveyed the land to a land company. *Held*, that such land company was not a *bona-fide* purchaser within the protection of Acts of 1887 and 1896. *Winona, etc., R. Co. v. United States* (1897), 17 Sup. Ct. 381.

Receivers—Priority of Claims for Supplies over Mortgage Debts.—A bill was filed to foreclose a mortgage on the property of a railway company which was in the hands of receivers. A creditor of the company petitioned to have his claim paid out of the proceeds of the mortgaged property in preference to mortgage debts. It appeared that such account, which was for supplies furnished prior to the receivership, was closed by a draft for the full amount with interest, accepted by the receivers, and that such receivers, during their administration, received earnings in excess of the operating expenses, the surplus having been applied to permanent improvements, to additions to property, and to interest. *Held*, that by such acceptance the receivers recognized and approved the claim, and that the claim of the petitioner should be preferred to the mortgage debts. *Southern Ry. Co. v. Adams* (1896), 76 Fed. Rep. 504.

Release of Claim for Damages—Unknown Injuries—Validity.—In *Seeley v. Citizens' Traction Co.*

(Pa. 1897), 36 Atl. Rep. 229, it was *held* that a release of claim for damages for injuries executed under seal by the injured person, in consideration of a sum of money, would not be set aside on the ground that she was ignorant of the character and extent of her injuries.

Sale of Railroad—Rights of Purchaser.—Where a railroad company, together with all of its rights and privileges, is sold on a foreclosure of a mortgage, the purchaser at such sale acquires only such rights to the property sold as the original company possessed. *Missouri Pac. Ry. Co. v. Henrie*, (Kan. 1896), 46 Pac. Rep. 976.

Liability of Purchaser of Railroad—Unpaid Condemnation Money.—Purchasers of a railroad and its franchises are liable for the unpaid condemnation money for such right of way as passes with the road, and for the non-paid obligations of the original company for such right of way as it may have acquired by purchase, which passed with the sale of the road. *Missouri Pac. Ry. Co. v. Henrie*, (Kan. 1896), 46 Pac. Rep. 976.

Liability of Purchaser of Railroad for Life Passes of Predecessor.—Purchasers of a railroad and its franchises are not liable to pay the value of life passes, to be given by the original company in consideration of a parol license to build and operate a road over its premises, where the purchasers had no knowledge of the parol contract at the time of purchase, or while using such premises, where they have in no manner ever ratified such contract, or assumed its obligation. *Missouri Pac. Ry. Co. v. Henrie*, (Kan. 1896), 46 Pac. Rep. 976.

12. RIGHT OF WAY.

Deed—Color of Title—Right of Way.—A deed from a railroad company conveying its railroad as

located by it in certain counties is color of title to the right of way. *St. Louis, etc., R. Co. v. Warfel*, (Ill. 1896), 45 N. E. Rep. 169.

Railways—Conveyance of Right of Way—Construction of Deed.—A landowner, after a survey for the route of a railroad had been made, stakes driven down, and trees marked through his land, executed a deed conveying to the railway company a strip of ground sixty-six feet in width, "lying along and including the established line of railway." *Held*, that such deed did not convey to the company a right of way across the land wherever the road should be finally run or located, but merely gave a right of way where the line was then marked. *Owensboro, etc., R. Co. v. Barker*, (Ky. 1896), 37 S. W. Rep. 848.

Abandonment of Right of Way—Adverse Possession.—For more than fifteen years a railway company had failed to use a strip of land which had been granted it as a part of its right of way, such land having been enclosed and used openly and continuously during that time for crops, pasturage and grass, without assent by the company, by one to whom it was conveyed by the original grantor. *Held*, that such grantee acquired title by adverse possession. *Mathews v. Lake Shore, etc., Ry. Co.*, (Mich. 1896), 67 N. W. Rep. 1111.

13. STOCK, INJURIES TO.

Defective Gate—Negligence—Proximate Cause.—Cattle inclosed in the pen of a railway company became frightened by a passing train and injured one who was attempting to secure the gate, the fastening of which was out of repair. *Held*, that the negligence of the company in failing to supply an adequate fastening was not the proximate cause of his injuries. *Texas, etc., Ry. Co. v. Bigham*, (Tex. 1896), 38 S. W. Rep. 162.

Defective Fastening to Cattle Pen—Negligence—Proximate Cause.—Cattle received by a railway company under a contract of transportation, and enclosed in a cattle pen were frightened by a passing train, and escaped from the pen, owing to the fact that the fastening of the gate was out of repair, and were injured. *Held*, that the negligence of the company in permitting the gate to remain out of repair was the proximate cause of such injuries. *Texas, etc., Ry. Co. v. Bigham*, (Tex. 1896), 38 S. W. Rep. 162.

Killing of Stock—Presumption of Negligence—Rebuttal—Instructions—Error.—In an action against a railway company to recover for the killing of stock, the court instructed the jury that, "the defendant having admitted that the mare was killed by its train, the law presumes negligence on the part of defendant's servants or agents; but, the agents and servants of defendant, in charge of its train by which plaintiff's mare was killed, having testified that the train was properly manned, and that they used reasonable care, skill, and diligence, and endeavored to avoid the killing or injury to the mare, the legal presumption is rebutted, and the jury should find for the defendant, unless they believe from all the evidence that the said servants were, in fact, negligent and careless, and by such carelessness and negligence plaintiff's mare was killed." *Held*, that such instruction was erroneous as assuming that the statements of the defendant's agents had rebutted the presumption of negligence, that being a question for the jury to determine. *Maddox v. Newport News, etc., Co.*, (Ky. 1896), 37 S. W. Rep. 494.

Animals Near Track—Duty of Engineer.—It is not the duty of an engineer to stop his train or check its speed when he sees animals near the track, where there

is no reasonable indication that they are going upon the track. *Yazoo, etc., R. Co. v. Whittington*, (Miss. 1897), 21 So. Rep. 249.

14. STREET RAILWAYS.

Construction of Electric Road—Conversion of Horse Railway—Additional Servitude.—The construction and operation, under legislative and municipal authority, of an electric street railway is not an additional servitude upon a street for which the abutting lot owners are entitled to compensation, nor is the conversion of an existing single-track horse-car railway into a double-track electric railway. *Reid v. Norfolk City R. Co.*, (Va. 1896), 26 S. E. Rep. 428.

Purchase of Consent of Abutting Owners to Construction—Validity.—Where a state statute provides that no street railway shall be authorized by the council of a city to lay its tracks in any street, except upon a petition of the owners of land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used, an agreement executed by such a company, in consideration of the consent of an abutting owner to the construction of its line, that it would not construct upon such street any other or more than a single track railway, without switches, is illegal, as being against public policy, and will not be enforced. *Doane v. Chicago City Ry. Co.*, (Ill. 1895), 45 N. E. Rep. 507.

Purchase of Consent of Abutting Owners—Validity.—Where a state statute provides that unless there is a petition of owners of more than one-half of the frontage to be used, city councils cannot grant franchises to street railways, a bond given by a street railway, in consideration of the consent of an abutting owner, that it will not construct more than

one track in such street, such bond cannot be justified as compensation for damages. *Doane v. Chicago City Ry. Co.*, (Ill. 1895), 45 N. E. Rep. 507.

Agreement in Limitation of Duty—Validity.—In *Doane v. Chicago City Ry. Co.* (Ill. 1895), 45 N. E. Rep. 507, it was held that an agreement by a street railway company, in consideration of the consent of an abutting owner to the construction of its track, that it would not thereafter lay a second track without his consent was invalid as limiting such company in the performance of its duty to the public.

Injury to Child in Street—Evidence.—In an action for the death of plaintiff's daughter, a child 5½ years old, by being run over by defendant's horse-car, the evidence, which was chiefly directed towards showing that the driver was negligent in failing to see deceased's danger and stop the car in time, failed to show such negligence, but there was evidence that the car brake was slightly out of repair, and also that the child first came in contact with the flank of the mule, and fell. The driver, who had testified that the child first struck the dashboard, and that it was then impossible to stop the car in time to avoid the accident, stated that, perhaps, had the child first struck the mule, and had the brake been in good condition, he could have avoided the accident. There was evidence that it generally required from four to six feet to stop a car, but there was no evidence as to the distance from the wheel by which the child was struck to the point where she came in contact with the mule. *Held*, that the evidence was insufficient to show that the defective condition of the brake contributed to the injury. *Gannon v. New Orleans City, etc., R. Co.* (La. 1896), 20 So. Rep. 223.

Negligence in Operation—Evidence.—In an action against a

street railway company to recover for personal injuries received through the negligence of such company in the operation of its cars, it is not error to exclude an ordinance authorizing the laying of the tracks of the defendant in the manner in which they were laid, as such ordinance had no bearing on the question of the defendant's negligence in the operation of its cars. *West Chicago St. R. Co. v. Annis* (Ill. 1896), 46 N. E. Rep. 264.

Injury to Person on Track—Contributory Negligence.—When one attempts to cross a street-railway track, in view of a trolley car, about 300 feet away, and coming in his direction at great speed, it is a question for the jury whether his act in attempting to cross under such circumstances was prudent or not; for he has a right to assume that the car is furnished with appliances to reduce speed and to stop, and with a motorman to make use of such appliances, and that the car will not continue to be run in violation of the law which limits the speed of vehicles using public streets to that which is compatible with the safe use thereof by other vehicles, and he is not bound to refrain from crossing for fear that the motorman will not make use of the appliances provided to reduce speed. *Consolidated Traction Co. v. Lamberton* (N. J. 1896), 36 Atl. Rep. 100.

Personal Injuries—Opinion as to Probable Duration of Disability—Testimony of Medical Experts—Admissibility.—Evidence of opinion in respect to the probable duration of physical suffering or disability, given by medical experts, is admissible, although based in part upon statements made by the suffering or disabled person relating to his past or present symptoms. *Consolidated Traction Co. v. Lamberton* (N. J. 1896), 36 Atl. Rep. 100.

Injury to Person on Track—Incidental Fright—Damages.—In *Consolidated Traction Co. v. Lamberton*, (N. J. 1896), 36 Atl. Rep. 100, an action against a street railway company to recover for personal injuries received through the collision of a wagon driven by the plaintiff with a car of the defendant company, it was held, that where there is actual physical injury, damages resulting from the incidental fright may be recovered.

Injuries to Pedestrian—Defective Arrangement of Wires.—In *Manning v. West End St. Ry. Co.*, (Mass. 1896), 44 N. E. Rep. 135, an action to recover for injuries received by a person on the street through the flying from the hands of a conductor of an electric car of a stick which he was using on top of a car, there was evidence that similar accidents had occurred there half a dozen times before. Held, that the evidence of the occurrence of the injury and of the fact that the trolley had become jammed at the same place before warrant a finding that the arrangements were defective.

Injuries to Pedestrian—Defective Arrangement of Wires—Negligence—Remote Cause.—In an action against a street railway company to recover for injuries caused to a pedestrian through the slipping from the conductor's hands of a stick with which he was freeing the trolley which had become jammed through the defective arrangement of the wires, it was held, that the negligence in the arrangement of the overhead wires was not so remote as to prevent recovery therefor. *Manning v. West End St. Ry. Co.*, (Mass. 1896), 44 N. E. Rep. 135.

Injuries to Passers-by.—In *Manning v. West End St. Ry. Co.*, (Mass. 1896), 44 N. E. Rep. 135, it was held that one walking along a sidewalk, or momentarily stopping is not bound to take special precautions against the possibility of being injured by the flying of a

switch stick from the hands of an employee of the railway company who was using it on top of an electric car to free the trolley.

Injuries to Passengers--Evidence as to Appearance before and after Injury--Admissibility.—In an action by a passenger against a street railway company to recover for personal injuries, where the evidence showed that she was injured to a greater or less extent at the time of the accident; that she was confined to her bed for several weeks thereafter in consequence of those injuries; and that she ultimately went to a hospital, and was there treated for sickness which she claimed was occasioned by the injury received, it was not error to admit testimony as to her appearance of health and disposition before and after the injury. *West Chicago St. R. Co. v. Kennedy-Cahill*, (Ill. 1897), 46 N. E. Rep. 368.

Riding on Platform--Negligence.—In *Bailey v. Tacoma Traction Co.*, (Wash. 1896), 47 Pac. Rep. 241, the court held that the occupancy of the front platform of a street car by a passenger whose fare had been accepted, and who, with others, had been in the habit of riding there, was not, in the absence of a rule of the company forbidding riding on the platform, contributory negligence *per se*.

Injuries to Passengers--Negligence--Instructions.—In an action against a street railway company to recover damages for personal injuries, received through the alleged negligence of the defendant in the management of its car from which the plaintiff was alighting, it is not error to instruct the jury that slight negligence on the part of the plaintiff was not necessarily incompatible with due and ordinary care. *Chicago City Ry. Co. v. Densmore*, (Ill. 1896), 44 N. E. Rep. 887.

Inconsistency between General Verdict and Special Findings.—In an action against a street railway

company to recover for personal injuries, the declaration charged that while the defendant was lying upon the ground by the side of the grip car, where he had been thrown by the collision of a wagon with the car while he was looking for a seat in the car which was stationary, the defendant negligently started its grip car suddenly into motion. The general verdict found the defendant guilty of the negligence charged. There was a special finding that the car was in motion when the plaintiff fell. *Held*, that the verdict and such special finding were inconsistent. *Ebsery v. Chicago City Ry. Co.*, (Ill. 1897), 45 N. E. Rep. 1017.

Injury to Passenger--Negligence--Question for Jury.—A passenger on a street railway having signaled the conductor that she wished to get off, was about to leave the car, using ordinary care and diligence while so doing, when the car was suddenly jerked forward, and she was thrown forward and injured. *Held*, that the defendant's negligence was a question of fact for the jury. *Chicago City Ry. Co. v. Densmore*, (Ill. 1896), 44 N. E. Rep. 887.

Injuries to Passenger--Proximate Cause--Question for Jury.—In an action to recover for the death of a passenger alleged to have been caused by the sudden starting of a street car as she was boarding it, it appeared that the deceased felt at once the physical effect of her injuries, followed, the next day, by symptoms of premature childbirth, which occurred a few days later, and was followed by tetanus, which caused her death. The medical testimony agreed that, while tetanus resulting from childbirth is comparatively rare, there is a distinct relation between it and childbirth, especially miscarriage, and that it is one of the natural and probable consequences to be appre-

hended. It was shown that the disease was caused by specific infection, but by the same witnesses it was shown that the mis-carriage made the deceased especially liable to infection. There was no evidence which would have justified the court in saying that there was an intervening independent cause. *Held*, that the question whether her injuries were the proximate cause of her death was a question for the jury. *Brashear v. Philadelphia Traction Co.*, (Pa. 1897), 36 Atl. Rep. 914.

Street Railways—Expulsion of Drunken Passenger.—It is the right and duty of a carrier to expel from his vehicle any person whose conduct or condition is such as to endanger the safety or to cause discomfort and annoyance to other passengers, and it is sufficient, to justify such expulsion, that the offender is, through intoxication or otherwise, in such a condition as to make it reasonably certain that, by act or speech, he will become offensive or annoying to other passengers, though he may not have committed any act of offense or annoyance. *Edgerly v. Union St. R. Co.* (N. H. 1893), 36 Atl. Rep. 558.

Expulsion of Drunken Passenger—Injuries—Proximate Cause.—A passenger who was intoxicated, but not so much so as to be bereft of intelligence or unable to walk, was expelled from a street car shortly after sunset at a place near dwellings, and upon a public highway. He wandered upon the track again and lay down and went to sleep there, and was killed by a car. *Held*, that his expulsion was not the proximate cause of his death. *Edgerly v. Union St. R. Co.* (N. H. 1893), 36 Atl. Rep. 558.

Street Railways—Failure to Place Signals at Switch—Negligence.—Where a street railway company fails to provide any signal at a switch whereby it can be known to employees bringing a car

through the switch on the main track that a car going in the opposite direction has passed the point where the switch opens into the main track, such fact is sufficient to establish negligence on the part of the company. *Bailey v. Tacoma Traction Co.* (Wash. 1896), 47 Pac. Rep. 241.

Street Railways—Vehicle near Track—Proximate Cause.—A person who had driven across the track of a street railway company stopped his vehicle in such close proximity to the track that a passing car collided with it and injured him. *Held*, that his nearness to the track was a condition of the injury, and not the cause of it. *Bedford v. Spokane St. Ry. Co.* (Wash. 1896), 46 Pac. Rep. 650.

15. TAXATION.

Payment of Taxes by Owner of Paramount Title—Effect.—In an action of ejectment against a railway company to recover a strip of land, it appeared that the railway company had paid taxes on such land for more than seven years, the strip, which was occupied by a track, being assessed as a track, and that the owner of the paramount title had for several years paid taxes on the whole quarter in which such strip was located before they were paid by the company, taking a receipt for the whole quarter. *Held*, that such strip as to its assessment, taxation and payment of taxes was separated and removed from the quarter as a whole, that the owner of the paramount title in the payment of taxes for the whole quarter did not pay for such strip, and that the payment by the company of the taxes was not avoided by his payment. *St. Louis, etc., R. Co. v. Warfel*, (Ill. 1896), 45 N. E. Rep. 169.

Taxation of Express Companies—Interstate Commerce.—A state statute taxing express companies

upon business done wholly within the state, and exempting interstate business of such companies is not in violation of the commerce clause of the United States constitution. *Osborne v. State of Florida*, (U. S. 1897), 17 Sup. Ct. 214.

Seizure of Railway Property for Taxes—Validity.—In *Chicago, etc., Ry. Co. v. Forest County*, (Wis. 1897), 70 N. W. Rep. 77, PINNEY, J., delivering the opinion of the

court, said: "The franchises and rights of a *quasi* public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment, and the accomplishment of the purposes for which it was created, constitute an entirety, and, in the absence of special statutory authority, are not subject to be seized and sold on execution, or for mechanics' liens, nor on tax process."

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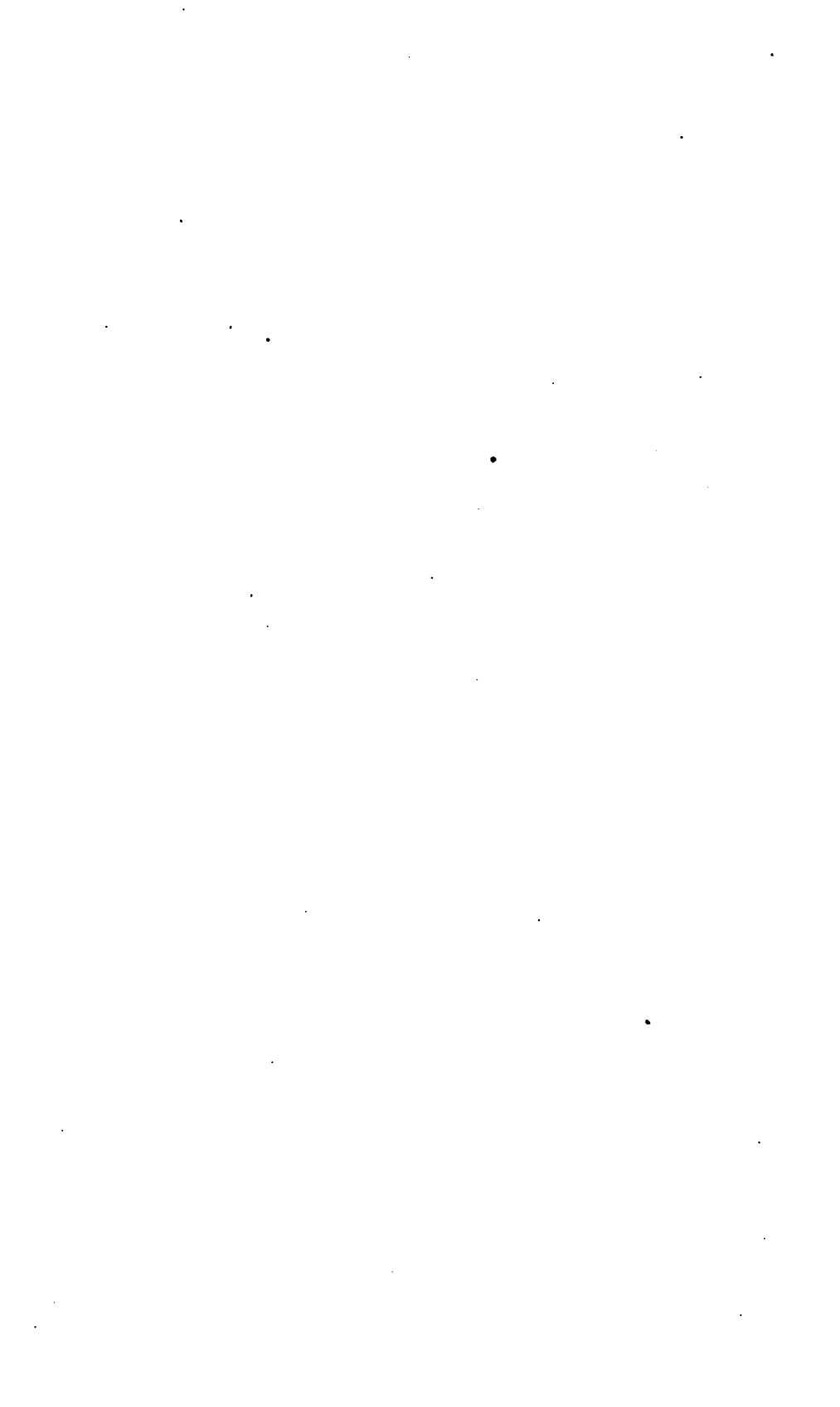
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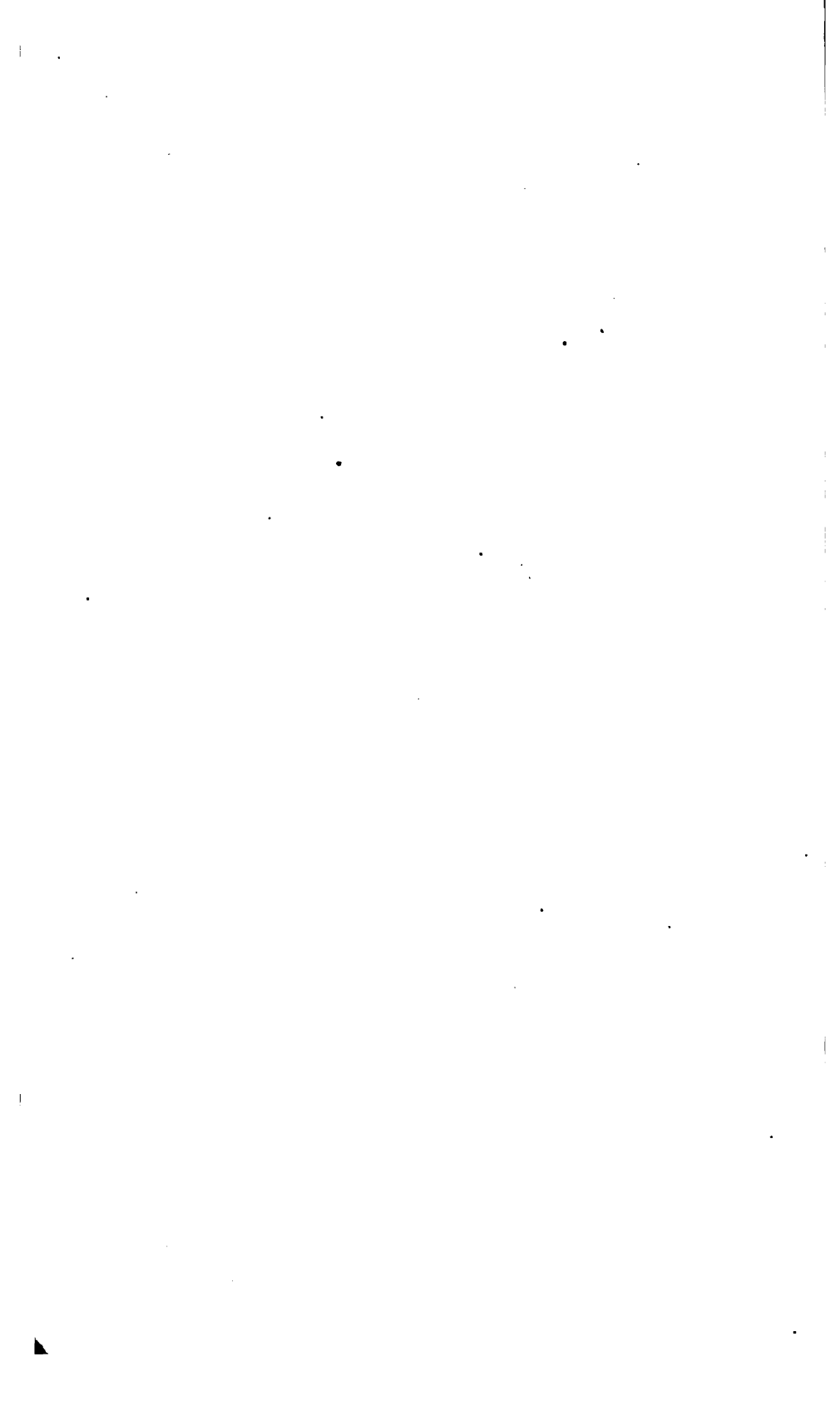
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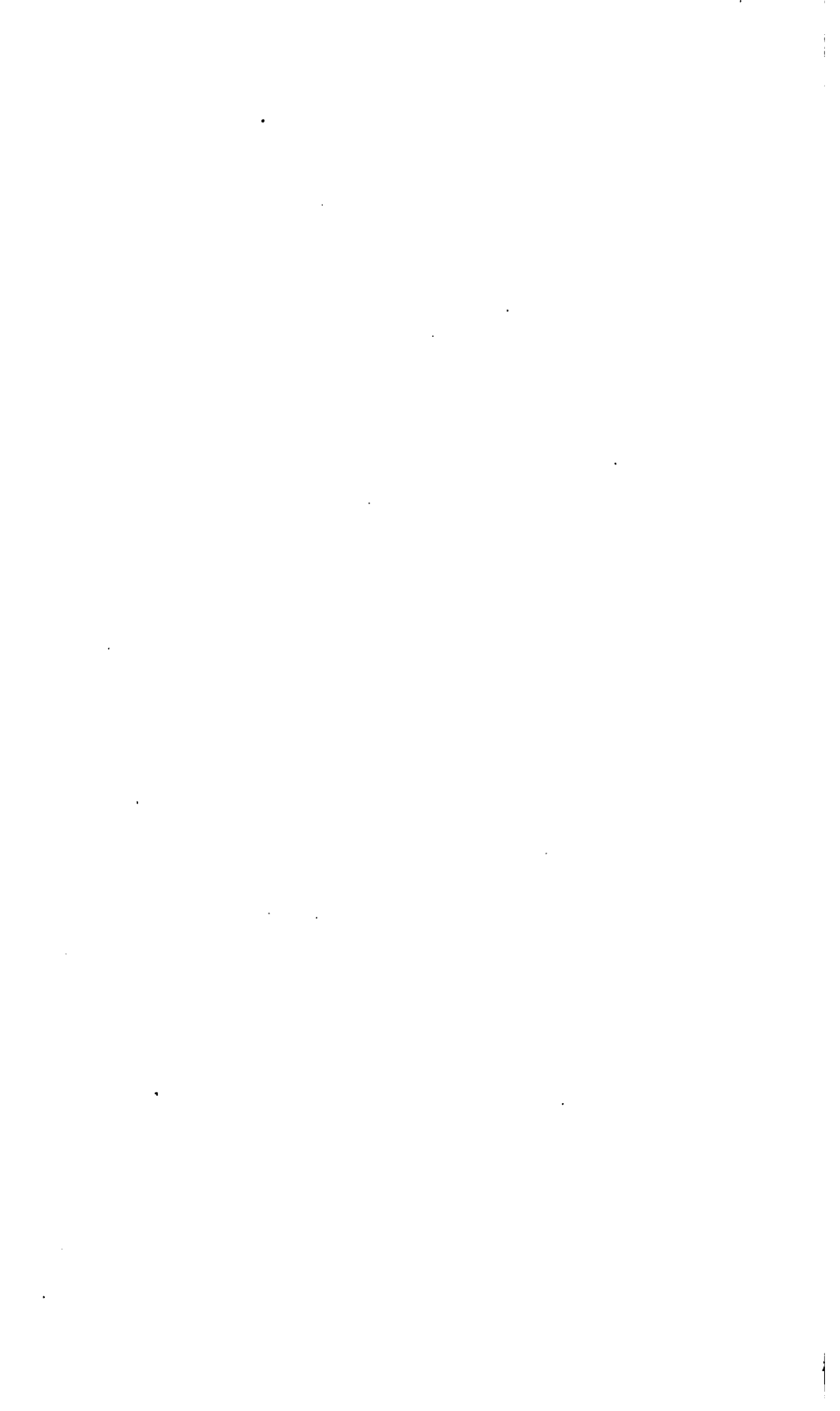


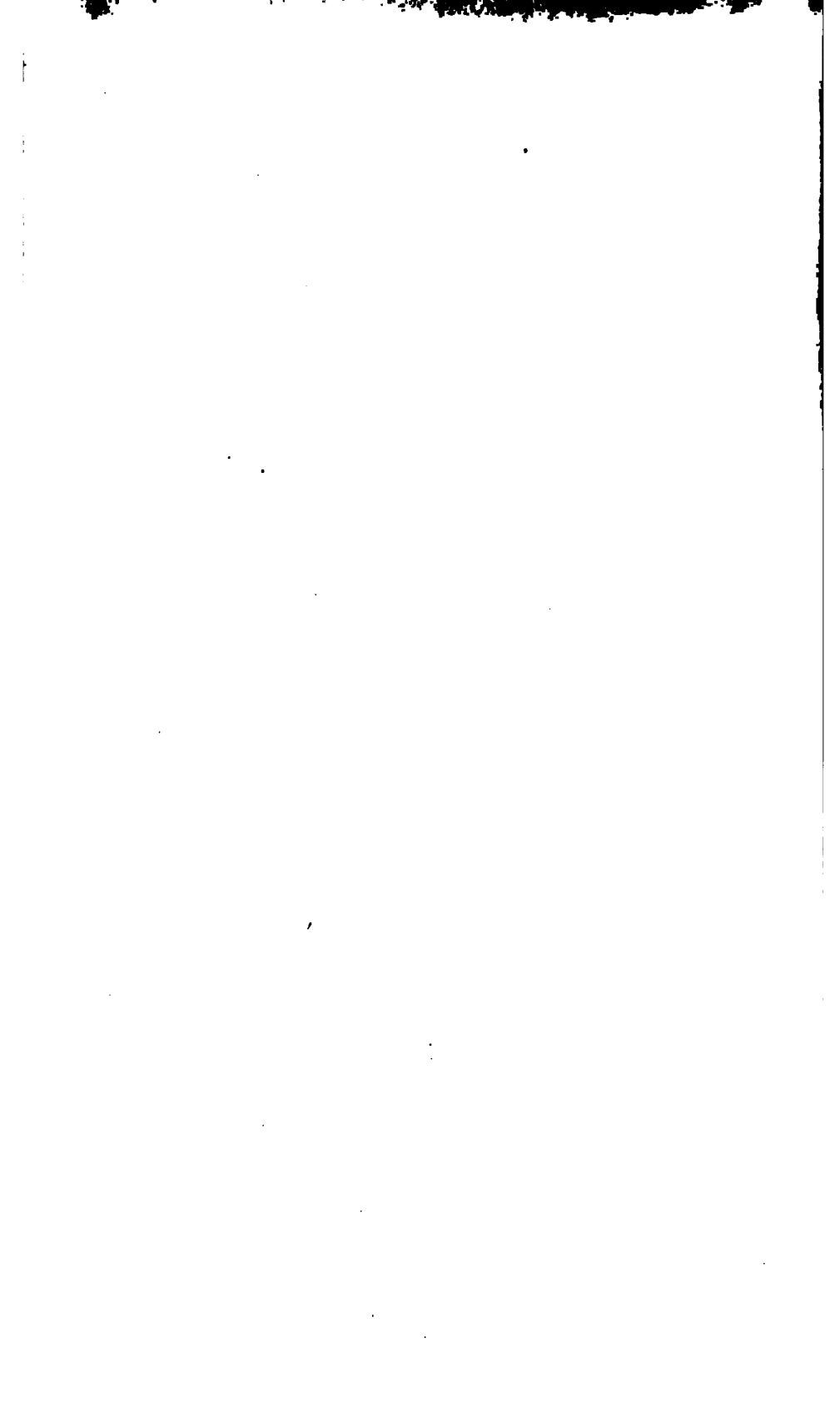












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